United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL

75-1073

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ISRAEL DIAZ-MARTINEZ,

Defendant-Appellant.

On Appeal From the United States District Court
For The Eastern District Of New York

Appellant's Appendix

Vol. II — Pages 311-697

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UNITED STATES COURT OF APPEALS
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Q Did you sniff that --

MR. SUTTON: Objection, your Honor.

THE COURT: On what ground?

MR. SUTTCN: He is leading him.

THE COURT: Overruled. Go ahead.

A Yes.

Q Was it cocaine?

MR. SUTTON: Objection.

A Cocaine, yes.

THE COURT: Overruled.

Q Did you meet with Barry on November 12, 1973?

A Yes.

Q Where did that meeting take place?

A In the store.

Q Had arrangements been made to sell anything to the agent on that day?

A Yes.

Q By the way, did you know at the time that Barry was an agent?

A No.

Q Would you tell us what arrangements were made about meeting with Barry regarding the sale on November 12th.

A Around November 11th I received a call from Victor Blanco. He told me that Barry was interested in one

eighth, because the sample that I had given him he had liked it.

Q After you received this phone call from Victor Blanco, did you do anything to obtain that eighth of a kilogram?

A Yes, I informed Diaz-Martinez about it.

Q Do you know when you informed him?

A On the 11th in the afternoon.

Q What did you tell Diaz-Martinez?

A That on the 12th Victor Blanco and Barry would come to pick up the one-eighth of cocaine.

Q What did he respond?

A He said that it was all right, that on the 12th, around 4 p.m. in the afternoon the eighth of cocaine was going to be at the store.

Around 1 p.m. Felipe Miranda and Diaz-Martinez arrived.

Q What happened then?

A Again I told him that at 4 p.m. Barry and Victor Blanco were going to come.

Q What did he say?

A He said, "Yes," that at 4 p.m. the eighth of cocaine was going to be at the shop.

Around 1 p.m. Felipe Miranda and Diaz-Martinez were at the store and then they left the store.

Israel Martinez then told me that I should wait for a phone call from him. Around one hour later I received the phone call from him and he told me that if Luis Miranda came by, I should send him to Juanita Guzman.

Q Is that the apartment at 239 South Fourth Street?

A Yes.

Q Did Barry arrive at the clothing store that afternoon?

A Yes, on two occasions.

Q Did he come with anyone?

A With Victor Blanco.

Q What happened the first time he came to the clothing store?

A Victor Blanco and Barry arrived at the store and I told him that the eighth of cocaine had not arrived yet and I asked him to come back later and they left.

Q Did they come back later?

A Yes, later.

Q What --

A (Continuing) But before that Felipe Miranda came and he gave me one-eighth of cocaine.

Q When the agents were there -- when Barry was there, did you make a phone call to anyone?

A I don't remember.

Q Did you call Juanita's house?

A Yes. When Victor Blanco arrived and the cocaine had not arrived yet, I called up Juanita and Juanita told me that Felipe was on his way with the cocaine to go to the store.

Q Now, you said there came a time when Felipe delivered you the eighth of cocaine; is that correct?

A Yes.

Q Do you remember in what kind of package it was in?

A Around 3 p.m. --

MR. KIMELMAN: I do not believe he understood, your Honor.

THE COURT: Strike that out.

Ask him another question, if you wish.

MR. KIMELMAN: Yes.

THE WITNESS: It was around 3 or 4 p.m.

MR. SUTTON: Is there any reason why the question and answer shouldn't be stricken?

THE COURT: I said to strike the statement out.

MR. SUTTON: Which one?

THE COURT: Mr. Kimelman said, "I do not think he understood the question."

MR. SUTTON: Thank you.

Q Do you remember what the package looked like?

A It was a small box and inside there was one-eighth of cocaine and Felipe gave it to me.

Diaz had already told me that I should keep it in the basement and so 20 or 25 minutes later Victor Blanco and Barry arrived.

Q What happened when they arrived?

A I told them that the cocaine was already there. I left Felipe in front of the shop and I went down to the basement with Victor Blanco and Barry.

Q When you got to the basement, what happened?

A The cocaine was there.

Q Did you show the cocaine to Barry?

A Yes, I showed it to him.

Q Did you have a conversation about the cocaine?

A Yes.

Q Do you remember any of that conversation?

A That he liked it, that he was going to buy it.

Q Did you discuss the price of the cocaine?

A No, because he was a customer, whatever was said to him to pay he would pay.

Q Did you tell him the price of this eighth of a kilogram?

A Diaz had told me to charge him $2,900.

MR. SUTTON: Objection.

THE COURT: What is the basis of the objection?

MR. SUTTON: He is not responsive.

THE COURT: May I have the question?

(Question read.)

MR. SUTTON: He is adding matters not relevant to the question.

THE COURT: May I have the question.

(Question reread.)

THE COURT: I will allow it to stand. I agree it is not responsive. The difficulty is obvious with this witness and I am not going to interpret the objections in the strictest sense. If it is relevant to the question, if it is testimony that would normally be admissible under a proper question, I will allow it. If it wouldn't be admissible under any question, then I will strike it.

Go ahead.

MR. KIMELMAN: Yes.

Q Did you get paid any money for that one-eighth of a kilogram?

A He liked the cocaine and he wrapped it up and he then said to me, "My partner who is the one that has the money is outside in the car."

We exited the store and we went to the car where his partner was and he paid me $2,900. I went to the store and I hid that money behind -- about one hour later Israel Diaz-Martinez came and I gave him the $2,900.

Q Did he give you any money in return?

A No.

Q After November 12th, did there come a time when Victor Blanco approached you about doing further deals with Barry?

A Yes.

Q What did Victor Blanco say to you?

A That Barry was interested in half a kilo of cocaine.

MR. MAHLER: May we have a date on this, Judge?

THE COURT: That will be cross-examination.

If you can fix it, Mr. Kimelman, please do it.

Q Do you recall the date that Victor Blanco told you that Barry wanted half a kilo of cocaine?

A November 19th, approximately.

Q And what did you tell Victor Blanco?

A That I would see if Israel Martinez had that quantity.

Q Had you ever sold a half of a kilo of cocaine before?

A No.

Q Do you know if Israel Diaz-Martinez had ever sold as much as half a kilo --

THE COURT: Did you ever see him sell, turn over?

Know comes from many sources and it may well be pure hearsay and rumor.

THE WITNESS: No, he would buy cocaine and he would --

MR. SUTTON: Objection, your Honor.

THE COURT: Strike everything after "No."

I wish you would follow up with questions. I said it would discourage the witness from continuing to answer after he has already responded.

MR. KIMELMAN: The only thing I could do is interrupt him.

THE COURT: After you have heard the answer and it is responsive, follow in with the next question.

MR. KIMELMAN: Yes.

THE COURT: If the question requires a yes or no and you know he is responding yes or no, give him the next question.

MR. KIMELMAN: Yes.

Q Did you ever see Israel Diaz-Martinez sell

one half kilo of cocaine?

THE COURT: Yes or no.

A No.

Q When you sold cocaine for Israel Diaz-Martinez, what was the quantity that you sold?

MR. MAHLER: I would object.

THE COURT: Sustained as to form.

Q On the occasions that you sold cocaine, what quantities did you sell --

MR. SUTTON: Asked and answered.

THE COURT: Sustained as to form.

What was the largest amount that you ever sold in a single transaction?

THE WITNESS: One-eighth.

Q Did you approach Israel Diaz-Martinez about obtaining the half kilogram of cocaine?

A Yes.

MR. KIMELMAN: Your Honor, may we have a brief recess?

THE COURT: We will have a 15-minute recess and if the jurors would like to use that time to go down for coffee, it will be perfectly all right.

I expect all the parties, the litigants and the lawyers, to be in the courtroom at 11:45 -- quarter

minutes are there to determine whether there is probable cause to bring your client into the conspiracy and nothing else.

MR. MAHLER: I believe there has to be a sufficient indictment to bring my client before this Court in the very first instance.

THE COURT: Why don't you make a motion to dismiss the indictment?

Would you like to do that?

MR. MAHLER: Yes.

THE COURT: Motion denied, United States against Costello.

Now seat the jury.

(Jury present.)

THE COURT: Please continue.

DIRECT EXAMINATION

BY MR. KIMELMAN: (Cont.)

Q Mr. Fiffe, did you have a conversation with Mr. Diaz-Martinez about obtaining a half-kilogram of cocaine for Barry -- just yes or no?

A Yes.

Q Do you recall when this conversation occurred?

A Around the 19th.

Q What did you say --

A Or maybe before that, maybe the 17th.

Q What did you say to Diaz-Martinez respecting this half kilogram of cocaine?

A That the customer Barry was interested in half a kilo.

Q What did he say to you?

A That he was waiting for the arrival of some cocaine, but that it had not arrived and he didn't know when it was going to arrive.

Q Did he tell you if he had any cocaine to sell at that time?

A No, he said thathe was waiting for it.

Q Did you ask anybody else?

A That he had some, but not that much.

Q Did you ask anybody else to help you get the half kilo for Barry --

MR. SUTTON: Objection.

THE COURT: May I have the question?

(Record read.)

THE COURT: What is the grounds of that objection, Mr. Sutton?

MR. SUTTON: I will withdraw it, your Honor.

THE COURT: Goahead. Answer the question.

A Yes.

Q Who did you ask?

A To Bermudez.

Q Do you see Mr. Bermudez in the Courtroom today?

A (Indicating.)

THE COURT: Let the record show that the witness pointed to defendant Eduardo Bermudez.

Q How do you know Mr. Bermudez --

MR. KIMELMAN: Your Honor, if I may withdraw the question?

Q When did you first meet Eduardo Bermudez?

A I saw him several times because he used to go to buy clothing at the store.

Q Did you ever see him in the company of Mr. Israel Diaz-Martinez?

A Yes, they used to talk.

Q Where did you see them together?

A Well, sometimes when Mr. Bermudez would come to the store, Mr. Diaz-Martinez would be in his office in the back of the store, and the customers would go to that back room to have a drink with him or to sniff a little.

Q Did you ever see Mr. Bermudez and Mr. Diaz --

MR. SUTTON: Your Honor, respectfully move to strike the answer as not responsive.

THE COURT: Motion denied.

Q Did you ever see Mr. Diaz-Martinez and Mr. Bermudez sniff cocaine together?

A Once or twice.

Q Where did you see this?

A In the back room of the store.

Q Did you ever sniff cocaine with them in the back room of the store?

A Yes.

Q Now, you said that you asked Mr. Bermudez about the half kilo of cocaine; is that correct?

A Yes.

Q What date, if you remember, did this conversation occur?

A November 19th.

Q Where did the conversation occur?

A At the store.

Q What happened when Mr. Bermudez got to the store on November 19th?

A He went to the store to buy some clothing and then I told him that a customer of Mr. Diaz, Mr. Barry, was interested in half a kilo of cocaine.

Q Did you tell him that he was a cocaine customer?

A Yes.

Q Did you tell him anything about your conversation

with Mr. Diaz?

A You mean if I told him?

Q Yes.

A Yes.

Q Did you tell him what Mr. Diaz had said to you about Mr. Diaz being able to obtain the cocaine?

MR. SUTTON: I rise reluctantly. I do understand your Honor's ruling before that you would let leading questions in, but I find it will be very difficult on my cross-examination to permit leading questions like this and follow-up with cross-examination in order to find the sequence of these things and find the foundation, and I would object and I would ask that the prosecutor be asked to form proper questions, notwithstanding the time factor that it may be a little longer.

THE COURT: I find this is a proper question. I assume what you are saying is that your objection is because of leading?

MR. SUTTON: Yes.

THE COURT: Objection overruled.

(Question read.)

A Yes.

Q Now, did Mr.Bermudez give you anything on that

day in the clothing store --

MR. SUTTON: May it please the Court, I think your Honor has ruled before that when a question requires a yes or no answer that you would require the yes or no and everything after that would be stricken.

THE COURT: That's my fondest hope. I won't adhere strictly to that ruling. The difficulty with this witness is obvious and I am not going to delay the trial for any technical and formalistic reasons.

May I have the question?

(Question read.)

THE INTERPRETER: You want me to give the answer?

THE COURT: Yes.

THE WITNESS: No, he arrived at the store and he invited me to sniff and I took the opportunity --

THE COURT: Strike everything after "no."

The jury disregard it.

THE COURT: Mr. Fiffe, try to answer only the question.

BY MR. KIMELMAN:

Q Did you sniff any cocaine with Mr. Bermudez in the clothing store?

MR. SUTTON: I am sorry, your Honor.

THE COURT: What is wrong with the question?

MR. SUTTON: It is the same leading kind of thing that I find difficulty with.

Now, I must put it to the record and your Honor can rule against me.

THE COURT: Objection overruled.

MR. SUTTON: Thank you.

THE INTERPRETER: The answer was yes.

BY MR. KIMELMAN:

Q Whose cocaine was it?

MR. SUTTON: Objection, your Honor.

THE COURT: Sustained as to form.

Q Did Mr. Bermudez give you the cocaine that you sniffed?

THE COURT: Mr. Sutton rises again on the grounds that it is leading. Objection overruled. The record has it.

MR. SUTTON: Thank you.

THE INTERPRETER: The answer is yes.

Q What did Mr. Bermudez say to you about getting the half kilo of cocaine?

MR. SUTTON: Objection.

THE COURT: Overruled.

A I explained to him and he told me that he could obtain it and then I told him that --

your objection and say on the ground it is leading and I will understand.

MR. KIMELMAN: May we have the last question and answer?

THE COURT: Yes.

(Testimony read.)

MR. KIMELMAN: May I ask the question again?

THE COURT: Do what you like. I can have the reporter read it back or you can ask it again. Do whatever you prefer to do.

MR. KIMELMAN: I prefer to ask it again.

THE COURT: All right, seat the jury.

(Jury present.)

DIRECT EXAMINATION

BY MR. KIMELMAN (Continuing):

Q What did Mr. Bermudez say to you about his obtaining the half kilogram of cocaine --

THE COURT: And what did you say to him?

MR. KIMELMAN: Thank you, your Honor.

A He told me that he could obtain it.

Q What did you say to him?

A That I would take him to Victor Blanco's house so that they could maek an agreement.

Q Did you go to Victor Blanco's house?

A That happened in the morning and I made an appointment for Bermudez to meet around 5:00 p.m. in the afternoon.

Q Did Mr. Bermudez come to the store at 5:00 p.m. that afternoon?

A He picked me up in his car.

Q And did you go to Victor Blanco's house with Mr. Bermudez at that time?

A Yes.

Q And was Mr. Blanco at home?

A Yes.

Q And did you have a conversation wiht Blanco and Bermudez in Victor Blanco's home?

A Yes.

Q Could you tell us what you said and what they said?

A We talked about the business --

THE COURT: Strike it out.

Try to tell us exactly what each one said and if you cannot tell us exactly what each one said, tell us substantially what each one said, identifying each speaker.

THE WITNESS: They talked about business of the cocaine --

THE COURT: Strike it out.

THE WITNESS: -- that it could be obtained --

THE COURT: Strike it out. I said I want to know who said what.

THE WITNESS: Bermudez said that the business could be done, that he would sell the half kilo to Barry.

Q What did Victor Blanco say?

A That it was all right.

Q What did you say?

A Well, I was -- well, the business was between them. I was there, but they were the ones who were going to do the business, they made an appointment to meet at the following day in Vivas' house.

THE COURT: Who is Viva?

THE WITNESS: The gentleman sitting there (indicating).

THE COURT: Let the record show that the witness pointed out the defendant Jorge Vivas.

Q When you say"Vivas' house" do you mean where he lived or where he worked?

MR. SUTTON: Objection.

THE COURT: Overruled.

What was the ground, that it was hardly leading?

MR. SUTTON: And suggestive of the very answer that he wants to give.

THE COURT: I do not want any argument. I want the ground, leading, right?

Any other ground?

MR. SUTTON: It is leading.

THE COURT: Overruled.

THE WITENSS: (Continuing) -- at the business place where he sells records on Gay and Knickerbocker.

Q Is that what you mean by "Vivas' house"?

A That's it.

Q Can you remember anything else about the conversation at Victor Blanco's house, between Victor Blanco, yourself, and Mr. Bermudez?

Just yes or no.

A No.

Q No.

Did you go anyplace with Mr. Bermudez after you left Victor Blanco's house?

MR. SUTTON: You told me I can rise and you'd make the ruling.

THE COURT: I want you to make the objection and state the ground.

MR. SUTTON: It is again leading.

THE COURT: Overruled.

THE WITNESS: (Continuing) Mr. Bermudez took me to Vivas' house --

MR. MATARAZZO: I didn't hear the question or the relative answer. Please have it repeated?

THE COURT: Yes.

(Question and answer read.)

THE COURT: Go ahead.

Q When you say "Vivas' house" again you mean the record store; is that correct?

A Yes.

MR. SUTTON: Same objection that I made before.

THE COURT: I want the ground.

MR. SUTTON: He is leading the witness.

THE COURT: Overruled.

Go ahead.

MR. SUTTON: And there's --

Q Did you go to the record store?

A Yes.

Q And did you meet with anyone at the record store, just yes or no.

A With Mr. Vivas.

Q And did you have a conversation with Mr. Vivas?

A No, Bermudez and Vivas were the ones that talked.

Q Were you introduced to Mr. Vivas?

A Yes --

Q Just yes or no.

What did you say when you were introduced to Mr. Vivas?

A Mr. Bermudez introduced me to Vivas and then I said that I already knew Mr. Vivas because Mr. Diaz had introduced me to him approximately one month earlier.

Q I draw your attention to November 20, 1973.

Did you go to Victor Blanco's on November 20, 1973?

A Yes.

Q Was anybody else there that day?

A Mr. Barry.

Q Was Victor Blanco there?

A Yes.

Q Did you place any phone calls while you were at Victor Blanco's house on November 20, 1973?

MR. SUTTON: Leading.

A Yes.

THE COURT: Objection on the grounds it is leading, overruled.

Q Who did you call?

A I called Bermudez and then I was told that he

was --

MR. SUTTON: Objection --

A (Continuing) -- in Vivas' house --

THE COURT: May I have the question?

(Question read.)

THE COURT: Grounds?

MR. SUTTON: Hearsay.

THE COURT: I will reserve decision on that and I will see what happened after that.

Q Do you know who you were talking to on the telephone?

MR. SUTTON: Objection, calls for a conclusion, your Honor.

THE COURT: Overruled.

MR. SUTTON: No proper foundation.

THE COURT: Overruled.

A With Mr. Bermudez.

Q Were you talking on the phone with Mr. Bermudez?

A No, I called up his house and I was told that he was not there, that he was in Vivas' house.

MR. MATARAZZO: Objection, your Honor, hearsay.

THE COURT: I will reserve decision on that. Go ahead.

Q Do you know to whom you were speaking?

A It was a lady whose name I don't know.

MR. MATARAZZO: Objection, your Honor, repeat hearsay.

THE COURT: I will reserve decision on it. Go ahead.

Q That person told you that Bermudez was at Vivas' house?

MR. MATARAZZO: Objection to the question.

THE COURT: Same question.

What's the next question, Mr. Kimelman?

Q Did you have that telephone number written on anything?

A Yes, I had it in my wallet.

Q What was it written on?

A On a business card of the business place of Israel Diaz-Martinez.

Q And after you made that phone call, did you in fact go to the record store?

THE COURT: Yes or no.

A Yes.

MR. SUTTON: Your Honor, I most respectfully urge that these leading questions, while they may apparently shorten the trial, are not fair -- just not fair.

THE COURT: I have just determined that they are not prejudicial.

Objection overruled.

Q Who went to the record store with you?

A Victor Blanco, myself -- Victor Blanco, myself, Barry and a partner of Barry, because at the time I was not aware that he was a law enforcement agent.

That was on the --

THE COURT: Wait, Mr. Sutton has an objection.

MR. SUTTON: I move to strike that portion --

THE COURT: Motion denied.

Go ahead.

Q When you got to the record store, did you go inside?

A Yes, we went inside.

Q Did all of you go inside?

A Yes.

Q Where did you go inside the record store?

A Not at the place where they sell -- they sell the things, but in the back of the store.

Q And do you recall who was in the back of the store when you got there?

A In front there were Vivas and Bermudez and then Victor Blanco, myself, Barry and his partner arrived.

THE COURT: Now I am ready to rule on the objection made by both counsel.

Objection is overruled, the motion to strike is denied.

From all the circumstances, the jury may draw the inference from all the established facts, the party who answered the telephone had authority from Mr. Bermudez to say where he was. It is admissible. If not, just disregard it.

MR. SUTTON: May we have an exception, your Honor?

THE COURT: Of course you have an exception. It is right in the rules.

MR. SUTTON: I understand.

THE COURT: Go ahead.

Q What happened when you got in the back of the record store?

A Well, there were Bermudez, Vivas and the four who had just arrived and we went --

MR. SUTTON: Objection.

THE COURT: Grounds, please?

MR. SUTTON: I would like to have -- he went beyond --

THE COURT: Just the ground.

MR. SUTTON: It is not responsive. The rest of

it is not responsive.

THE COURT: May I have the question and answer?

(Testimony read.)

THE COURT: I find it is responsive.

A (Continuing) -- we went to the back room, but the half kilo of cocaine had not arrived yet.

MR. SUTTON: That motion is renewed, your Honor.

THE COURT: The question was what happened.

MR. SUTTON: That is right.

THE COURT: And he is describing what happened. Objection overruled.

Please sit down. The objection was ruled on twice. That is enough for one objection. Please continue.

Q Did there come a time when somebody else arrived at the record store that you saw?

A Yes.

Q Could you describe the circumstances involved with that person arriving?

A Around half an hour later a person arrived and that person had a conversation with Bermudez and Vivas.

Q Did you hear the conversation?

THE COURT: Yes or no.

MR. SUTTON: I'd like to hear the whole part of

that.

THE COURT: Yes or no.

MR. SUTTON: Your Honor, I most respectfully --

THE COURT: Please sit down. The question is yes or no.

What is the question again?

(Question read.)

A That the half kilo was coming.

Q Who said that?

A The men who had just arrived.

Q Did he say this to Mr. Bermudez?

A To Bermudez.

Q Did you hear what Mr. Bermudez said to this man?

A All right, all right, the customer was there -- the customer being Mr. Barry.

Q Did there come a time when someone arrived with a package?

A That same man exited the store and five minutes later returned to the store with a package containing the half kilo of cocaine.

Q Was the package opened?

A Yes, opened.

Q Did you observe what was inside the package?

MR. KIMELMAN: Your Honor --

A Yes, I don't remember whether there was one package or two packages, one-eighth and one-eighth or half -- or half, but I remember the package was opened and it was cocaine.

Q Did you try -- stirke that.

Did you sniff any of the cocaine in that package?

MR. SUTTON: Objection, your Honor.

THE COURT: On what ground?

MR. SUTTON: It is leading.

THE COURT: Overruled.

A Yes, Victor sniffed it and so did I and one or tow of the other persons there did the same thing.

Q Was it cocaine?

A Cocaine, yes.

Q Was there a purchase made of that cocaine, half kilo in the record store?

A No.

Q After November 20th, 1973 did you make any further attempts to contact Mr. Bermudez?

MR. SUTTON: Objection, no foundation for that one.

THE COURT: Objection overruled.

A No, neither with Vivas or Bermudez.

Now that I see him, there is the first time.

Q Did Special Agent Abbott -- Barry -- did he ever ask you to contact Mr. Bermudez?

A Well, yes.

(Continued next page.)

Q Do you recall when?

A When the half-kilo was brought into the store, the negotiations for the sale were not concluded because the agent said that he wanted to buy half of it, and they said that they wanted to sell all of it. And they made an appointment to meet at 4:00 p.m. in the afternoon of the 21st, that he would come to pick it up.

In that morning I received a phone call from Victor Blanco to find out whether the sale could be made around 4:00 p.m. when the customer was supposed to come.

Q Did you make --

A Then I called Bermudez.

Q What did you say to him?

A I told Bermudez that Victor had told me that the customer was going to come at 4:00 p.m. that afternoon.

Q What did Bermudez say?

A He answered me that he had already spoken to the person and there was no business to be done because the cocaine had already been sold, all of it. And approximately one hour later I received a phone call from Victor Blanco.

Q What did he say?

A And I gave him the message that Bermudez had given me to tell Barry that the business would not be done because it had already been sold.

Q Mr. Fiffe, do you own a car?

A I received as a present a Mercury --

MR. MAHLER: I object to that.

THE COURT: Strike out "I received as a present."

The question is, do you or did you?

BY MR. KIMELMAN:

Q Do you?

THE COURT: Yes or no.

A Yes.

Q What type of car is it?

A I had one car, but I left it to Diaz and Diaz told me that it had been stolen from him. I had a car and I used for the business of the store.

Q What make car was it?

A A big Mercury, '67. The plates were from Ohio.

Q Did anyone give you that car?

A Yes, a girlfriend of mine.

Q Did anyone help you obtain a license or registration for that car?

THE COURT: What is the relevancy to the issues in this case?

MR. KIMELMAN: I believe the answer will suggest it.

A Yes.

Q Who was that person?

A Israel Diaz-Martinez.

Q Was that the car that you drove on the meetings of November 5, the 12th and the 20th?

A Yes.

MR. KIMELMAN: I have no further questions.

THE COURT: Are you ready for cross-examination, Mr. Sutton?

MR. MAHLER: I have an application to make outside the presence of the jury.

MR. SUTTON: May we have --

THE COURT: The jury may be excused.

(Jury excused.)

THE COURT: Mr. Kimelman, was Special Agent Dovedko the only witness to testify before the Grand Jury?

MR. KIMELMAN: Special Agent Abbott, also. That is the complete Grand Jury testimony.

Your Honor, if I may, I would like to disclose at this time to counsel some information under Brady versus Maryland.

This witness has just testified that he took Eduardo Bermudez to Victor Blanco's house on the 19th of November, 1973 and there was a meeting between the

MR. MAHLER: It is your ruling that if a man is merely named in the indictment, that he can be brought to trial and that the People can cure any defect --

THE COURT: Not even cure. That is one of the interpretations of Costello.

MR. MAHLER: All they have to do is name me in the indictment, without any evidence at all.

THE COURT: You read Costello.

MR. SUTTON: They could do it on hearsay.

THE COURT: May I have the Grand Jury minutes?

MR. KIMELMAN: All of the Grand Jury minutes?

THE COURT: Those that name Mr. Israel Diaz-Martinez.

MR. KIMELMAN: I will have to get them together for your Honor.

MR. MAHLER: I have a motion for a mistrial here. I think it was highly prejudicial to just bring out that Mr. Diaz supplied Mr. Fiffe with an automobile with out-of-State plates. The only inference that could be drawn is that he committed some crime and that he gave him a falsely registered car, which has nothing to do with this case.

THE COURT: It may be part of the cocaine

business, sure. It is perfectly on point, on target. It is part of the concealment, the covert method, the surreptitious way it is carried on; it is absolutely on point.

MR. SUTTON: I thought the testimony was that a girlfriend gave him the car.

THE COURT: I don't care what the testimony was. Mr. Mahler interpreted it as testimony that Mr. Diaz-Martinez procured the Ohio plates, and he said that it might very well involve another crime. So what? It's part of the concealment of the narcotics business.

You know, the testimony is going to get into this trial -- the witnesses are going to give their story, if a hundred objections are made or if one objection is made.

MR. SUTTON: Don't misunderstand me --

THE COURT: I do misunderstand you. I never in a trial heard this many objections. What I can say, Mr. Sutton, is that you are very persistent, but I can't see anything else to the objections.

MR. SUTTON: I can't just sit still and let things go in that don't --

THE COURT: A witness says --

MR. SUTTON: -- (continuing) don't have a chain.

A I couldn't tell.

Q Now, do you claim to have a test by which you can tell whether a substance is cocaine or not?

MR. KIMELMAN: Objection, your Honor.

THE COURT: Overruled, I will allow it.

Q Just yes or no, first, please.

THE COURT: First give us a yes or no.

A Yes.

Q Now, can you tell us in your own words what your test is, what you say your test is, to determine whether a mass or mixture of white powder does or does not contain cocaine?

A I don't have any test, any system. My system is merely sniffing it, and then I know it is cocaine.

(continued on next page.)

THE COURT: I will hear that argument if he is convicted.

MR. MAHLER: I move for a severance.

THE COURT: Motion denied.

MR. MAHLER: The defense we are to bring out will be antagonism -- will enunciate for the defendant Bermudez.

THE COURT: Denied.

MR. MAHLER: I also would like to call the defendant Vivas as a witness. I don't think his attorney will call him.

THE COURT: That ploy has been used a number of times. We will find that out. When you renew your motion again, we will find that out.

MR. MAHLER: What you term a ploy I think it is an obviously logical thing for the defendant Diaz to do.

THE COURT: That's a point on appearl where you can say this is the man who could have proved my man's innocence, and he won't testify, and therefore we need another trial.

Denied at this time. Seat the Jury.

(Jury present.)

(Continued on next page.)

speak to him because he is an American citizen. He was born here.

Q Did Blanco translate for you?

MR. SUTTON: Objection.

THE COURT: Overruled.

I will allow it.

MR. SUTTON: May I give the grounds, your Honor?

THE COURT: Yes.

MR. SUTTON: No proper foundation has been laid to establish that in the testimony that that is a fact.

THE COURT: That is what we are trying to find out.

Go ahead.

A I gave it to Mr. Victor Blanco, Blanco and him talked and he liked it and he gave the money to Victor Blanco and Victor Blanco gave the money to me and I in turn gave it to Israel Diaz-Martinez.

MR. SUTTON: I move to strike it.

THE COURT: Strike it out as not responsive.

The only question is did Victor Blanco translate.

Do you know?

Yes or no.

THE WITNESS: No.

MR. SUTTON: Objection.

THE COURT: Overruled.

I will allow it.

Yes or no.

A No.

Q Didn't you tell Agent Abbott that noe of your customers ever complained?

A I don't speak English.

Q Didn't you tell him through Blanco?

MR. SUTTON: Objection.

THE COURT: Sustained as to form.

Did you tell it to Blanco?

A No, I gave --

THE COURT: Strike everything out after no.

Q Is it your testimony that you received $500?

A Yes, and I gave it to Diaz-Martinez.

THE COURT: Strike out I gave it to Diaz-Martinez.

Will you tell him that I struck it out so it is not getting in?

Q Did you give any part of the money to Blanco?

A No.

Q And is it correct to state that you yourself received no money?

****

Fiffe-cross/Mahler

Q When you met Agent ABbott for the second time did he ask you about the price of cocaine?

A No.

Q Did you tell Agent Abbott that the price of an eighth of a kilo of cocaine was $2900?

A No, not at that moment, no.

When the sale took place --

THE COURT: Strike out when the sale took place. Up to not at that moment I will allow it to stand.

Q Did you tell the agent he could make another eighth of a kilo from the rocks of cocaine, from the cocaine rocks?

A Not at that moment, no.

Q Did you ever tell him that.

A No.

Q Were you in the practice of snorting cocaine with Blanco?

A No.

THE COURT: Strike out everything else after no.

Q Do you ever remember Agent Abbott asking you to take $2700 instead of $2900?

A No.

Q Now, did there come a time when you met with Mr. Mermudez?

L U I S F E L I P E M I R A N D A , called as a witness nerein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. KIMELMAN:

THE COURT: All right, Mr. Kimelman.

Q Mr. Miranda, do you understand and speak English?

A Yes.

Q WHat country were you born in, sir?

A Puerto Rico.

THE COURT: Mr. Kimelman, I'm having difficulty hearing you. If you speak a little louder you will encourage the witness to speak louder.

Try to speak as loudly as you can, Mr. Miranda.

Q How much education have you had, sir?

A Second year high school.

Q Are you married?

A Yes.

Q Do you have any children?

A Yes.

Q How many, sir?

A FIve.

Q Mr. Miranda, have you ever been arrested before?

A Yes.

Q Will you tell us the circumstances of your arrest?

A I was arrested in 1971 for possession of marijuana.

Q What was the result of that arrest, sir?

A I pled guilty to it.

THE COURT: I have advised the witness that if he has any difficulty understanding any question, that Mrs. Mensa, our Interpreter, will translate for him.

Q Were you convicted?

A Yes.

Q For that arrest?

A Yes.

Q What were you sentenced to?

A Four years.

Q Did you go to jail, sir?

A Yes.

Q How much time did you spend in jail?

A Fourteen months.

Q Now, sir, have you pled guilty to charges arising out of this case?

7 Miranda - direct

A Yes.

Q Do you know, sir, what you pled guilty to?

A Conspiracy.

Q Is that conspiracy?

A Yes.

Q Do you know the penalty for the crime to which you pleaded guilty, sir?

A Yes, zero to fifteen.

(continued next page.)

Rose ilws.

DIRECT EXAMINATION

BY MR. KIMELMAN (Cont'd):

Q Is that zero to 15 years?

A Yes.

Q Did you make any agreement with the Government to testify here today?

A The agreement was that of the six counts, I only plead guilty to one.

Q Did the Government say that it would do anything else for you in return for your testimony?

A (Through the interpreter) The agreement was that I was going to plead guilty to one charge of the six charges pending against me, and that they would also make a recommendation to the charge on the other charge that I have pending in the State.

Q Sir, do you have another -- are you indicted in the State Court?

A Yes.

Q Could you tell us what you're indicted for?

A I am indicted for sale oc cocaine.

Q Is it your testimony that the Government will make your cooperation known in this case to the sentencing judge in the State Court?

A (Through the interpreter) Yes.

Q Is the Government to make your cooperation

in this case known to the judge who will sentence you on the conspiracy count?

A (Through the interpreter) Yes.

Q Has any promise been made to you as to the sentence that you will receive either here or in the State Court?

A No.

Q Do you have any other agreement with the United States Government relating to your testimony here today?

A (Through the interpreter) No, that's all, no agreement has been reached as far as the sentence I'm going to receive.

Q Before you were arrested in this case, Mr. Miranda, where were you employed?

A In 293 Grand Street, Brooklyn.

Q Who was your employer, sir?

A My boss?

Q Yes.

A Mr. Israel Diaz.

Q Do you see Mr. Israel Diaz in the Court today?

A Yes.

Q Will you point him out, tell us what he's wearing?

A Yes. He got a beige suit on and a red sweater.

THE COURT: Will you please stand, Mr. Diaz-Martinez?

Is that the gentleman you pointed out?

THE WITNESS: Yes.

THE COURT: Let the record show the witness pointed out the defendant Israel Diaz-Martinez.

BY MR. KIMELMAN:

Q When did you meet Mr. Diaz-Martinez?

A 1971.

Q Where did you meet him?

A He owned a bar in Brooklyn, Union Avenue.

Q Did you work for him at that time?

A Yes.

Q What did you do for Mr. Diaz?

A I was probably manager of the place.

Q When did you start working in the clothing store for Mr. Diaz?

A In August 1st.

Q What year, sir?

A 1973.

Q Did there come a time, Mr. Miranda, when someone approached you about dealing in cocaine?

A Yes.

MR. SUTTON: Objection as to form, your Honor.

THE COURT: Overruled. I'll allow it.

On what ground?

MR. SUTTON: Objection as to form on the leading --

THE COURT: Overruled.

MR. SUTTON: It's leading.

THE COURT: Overruled on the grounds stated.

BY MR. KIMELMAN:

Q You may answer.

A Yes.

Q Who was that, sir?

A Mr. Israel Diaz.

Q When did he make this approach?

A In October.

Q Did you have a conversation relating to this with Mr. Diaz-Martinez?

A It was me, Mr. Fiffe, Mr. Diaz was in the back and --

Q Do you recall what Mr. Diaz-Martinez said to you at that time?

A (Through the interpreter) He said the store is making progress, the prices are going too high, we don't got enough money to take home and we have to at least bring

a salary home, we have to do something, and then he received some cocaine and we started moving out in October.

Q When you say Mr. Fiffe was present at this conversation --

A Yes.

Q -- did you in fact start to sell cocaine?

A Yes.

Q When did you start to sell cocaine?

A Around October the 3rd.

Q 1973?

A Yes.

Q Who else in the clothing store was selling cocaine around that time?

A (Through the interpreter) Mr. Fiffe.

Q Was Mr. Diaz selling cocaine at that time?

A Yes.

Q Was Juanita Guzman selling cocaine at that time?

A (Through the interpreter) She was Mrs. Diaz.

Q Was she married to Mr. Diaz?

A Not marriage.

Q Did she live with Mr. Diaz?

A Yes.

Q Where did she live with Mr. Diaz?

A 239 South 4th Street.

Q Do you know who paid the rent for that apartment?

A It was no rent paid.

Q Do you know why there was no rent paid?

MR. SUTTON: Objection, your Honor.

A Because --

THE COURT: Sustained. Don't answer.

Q Do you know who furnished that apartment?

A Mr. Diaz.

Q What did Mr. Fiffe do in relation to the selling of the cocaine?

A (Through the interpreter) He was in charge of receiving the calls at the store.

Q Did he say anything else?

A (Through the interpreter) I don't remember. The only thing he did was to receive the calls.

Q Do you know if he got paid for this?

A (Through the interpreter) I don't know.

Q Did Mr. Fiffe ever tell you if he ever received any profits from what he did?

A (Through the interpreter) Only once he told me that he didn't receive any money.

THE COURT: He told you only once.

THE WITNESS: Yes.

THE COURT: Or he didn't receive profit out of one of the sales?

THE WITNESS: That he --

MR. SUTTON: Can he speak a little louder when he answers in Spanish, your Honor? It might be helpful all around.

THE COURT: When you give your answer in Spanish, try to speak a little louder so the interpreter at counsel table can hear you.

THE WITNESS: I don't remember. Only once he told me that he didn't receive any money.

BY MR. KIMELMAN:

Q Did Mr. Fiffe ever tell you that he received any tips from customers?

A Yes.

Q What did Juanita Guzman do in relation to the sale of cocaine?

A She hold the material.

Q Where did she hold the material?

A 239 South 4th Street.

Q Have you ever been in 239 South 4th Street?

A Yes.

Q How many occasions?

A Mostly all the time I come out of from parole.

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DIRECT EXAMINATION

BY MR. KIMELMAN: (Cont.)

Q I'm sorry, I didn't hear you?

A All the time -- every time I come out from jail I went a few times to that house.

Q How many times a month would you go to 239 South 4th Street?

A Mostly every day.

Q What was your purpose in going there every day?

A We got packages.

Q Did anyone ever tell you to go there and pick up packages?

A Yes.

MR. SUTTON: Objection, your Honor.

THE COURT: Overruled.

Q Who was that --

THE COURT: On what ground, Mr. Sutton?

MR. SUTTON: I will withdraw it, your Honor.

THE COURT: Go ahead.

Q Who was that person?

A Mr. Diaz.

Q Did you know what kind of packages you were picking up?

A Yes.

Q What was inside the packages?

A Cocaine.

Q Did you ever see cocaine inside the packages?

A Yes.

Q Is it your testimony that the cocaine was kept at 239 South 4th Street?

A Yes.

Q Do you know if it was kept anywhere else?

A In the store, a couple of times.

Q Did you ever see cocaine in the clothing store?

A Yes.

Q On how many occasions?

A About six, seven times.

Q Where would it be kept in the clothing store?

A Sometimes in the basement, sometimes in the old clothes of when -- the old clothes.

Q Did you ever see anybody bring cocaine into the clothing store?

A (Through interpreter.) Mr. Diaz.

Q On how many occasions did you see Mr. Diaz bring cocaine into the clothing store?

A Just twice.

Q Mr. Miranda --

MR. MAHLER: May we have a date set for these

things, your Honor, these occasions.

THE COURT: If you can fix it, you try to fix it. But you have a right of cross-examination, Mr. Mahler.

Q Are you okay, Mr. Miranda?

A Yes.

Q Mr. Miranda, what did you do in relation to the sale of cocaine?

A- I was the delivery man.

Q Who gave you packages to deliver?

A Mr. Diaz.

Q Do you recall any specific occasions when he gave you packages?

A I remember the --

Q Just yes or no?

A Yes.

Q How often would Mr. Diaz give you packages to deliver?

MR. MAHLER: Excuse me, your Honor, can we please have a date, times of the year set.

THE COURT: If you can fix it, Mr. Kimelman,

MR. KIMELMAN: If I can get the first answer, your Honor.

A Every week.

Q How many times a week?

A Every week, two, three times, four times a week.

Q When is the first time that you delivered a package for Mr. Diaz?

A In October 1973, but nothing could be sold.

Q After you delivered the package to a customer, would you receive anything in return?

A Money.

Q Do you recall any occasions when you received a particular sum of money?

A (Through interpreter.) I would receive 600 -- around 1,000 per week for the deliveries that I did.

Q Would you keep this money?

A No.

Q What would you do with the money that you received?

A I gave it to Mr. Diaz.

Q Did you give all the money to Mr. Diaz?

A Yes.

THE COURT: When you say you delivered packages to customers, you said two, three or four times a week?

THE WITNESS: Yes.

THE COURT: Was it the same customers or

things, your Honor, these occasions.

THE COURT: If you can fix it, you try to fix it. But you have a right of cross-examination, Mr. Mahler.

Q Are you okay, Mr. Miranda?

A Yes.

Q Mr. Miranda, what did you do in relation to the sale of cocaine?

A- I was the delivery man.

Q Who gave you packages to deliver?

A Mr. Diaz.

Q Do you recall any specific occasions when he gave you packages?

A I remember the --

Q Just yes or no?

A Yes.

Q How often would Mr. Diaz give you packages to deliver?

MR. MAHLER: Excuse me, your Honor, can we please have a date, times of the year set.

THE COURT: If you can fix it, Mr. Kimelman,

MR. KIMELMAN: If I can get the first answer, your Honor.

A Every week.

Q How many times a week?

MR. MAHLER: Can we please have a date on that.

THE COURT: All right, Mr. Kimelman, next question.

BY MR. KIMELMAN:

Q What did Mr. Israel Diaz-Martinez do in relation to the sale of cocaine?

A He would give me, for instance, two packages and then I would make the delivery and then he would receive the money. The only thing he would do would be cut the material.

Q Did you ever see Mr. Diaz-Martinez cut the material?

A Yes.

Q Could you tell us what you mean by "cut the material"?

A Cut the material means put in powder to make -- (through the interpreter) they use lactose to cut the material. They take one part and one part and they mix it and from one-eighth they make two.

Q And you say that you observed Mr. Diaz-Martinez cutting this material?

A Yes.

Q On how many occasions?

A Almost all the time.

different customers?

THE WITNESS: Different customers.

THE COURT: Did you ever deliver more than once to the same customer?

THE WITNESS: Yes. Maybe he sold one day or two days, yes.

Q Do you know how much cocaine was contained in the packages you delivered?

A Yes.

Q Would you tell us?

A We had ounces and quarter ounces.

Q Did you ever deliver a package containing anything more than a quarter -- strike that. Didyou ever deliver a package containing more than an ounce of cocaine?

A More than an ounce of cocaine? Just ounces -- yes.

Q What is the largestpackage of cocaine that you ever delivered?

A An eighth of cocaine, one-eighth.

THE COURT: When you say one-eighth, one-eighth of what?

THE WITNESS: Cocaine.

THE COURT: Of what, a kilo?

THE WITNESS: Yes, one-eighth of a kilo.

Q Any other terms?

A For cocaine, that was the only one.

Q Mr. Miranda, did you ever make an attempt to stop selling cocaine?

A Yes.

Q Did you have a conversation with Israel Diaz-relative to your stopping the sale of cocaine?

A Yes.

Q Could you tell us what you said to him and what he said to you?

THE COURT: First fix the time.

Q When did this conversation occur?

A It was around the 30th or 31st of October.

THE COURT: 1973?

THE WITNESS: Yes.

Q Where did this conversation occur?

A 239 Grand Street.

Q Is that the clothing store?

A Yes.

Q Was anyone present other than you and Mr. Diaz?

A Yes.

Q Who else was present?

A Mr. Fiffe.

Q What did you say to Mr. Diaz-Martinez and what

MR. MAHLER: I object and move to strike unless some date is being given.

THE COURT: Denied.

Q Mr. Miranda, did you ever employ any code words in your sale of cocaine?

A Yes.

Q Could you tell us what those words are?

A One ounce of cocaine contains one shirt.

Q One ounce of cocaine is one shirt?

A Yes, one white shirt.

Q What other terms did you use?

A (Through interpreter.) One eighth of cocaine would be 8 white shirts.

Q Any other terms that you remember using?

A (Through interpreter.) These are the only words in code that we would use.

Q Did you use any words to disguise the price of cocaine?

A Yes.

Q What words would you use to disguise the price of cocaine?

A It was one shirt is $6.

Q What did that mean?

A $600.

A Yes.

Q Are you able to recognize his voice on the telephone?

A Yes.

Q When he called you on November 5, 1973, what did he say to you?

A (Through interpreter.) He asked me to go to 239 South 4th Street and I went there. When I arrived there Juanita Guzman was in one corner, Mr. Diaz-Martinez was in the other corner and I was in the middle. He had a package. He opened the package. There was cocaine inside and I tasted it and I said that it was good.

Q Did you observe Mr. Diaz or Juanita Guzman do anything?

A Yes.

Q (Continuing.) With that cocaine?

A Yes.

Q What did they do?

A (Through interpreter.) They put the cocaine through a strainer three times and then they added the mixture and they mixed it up, then he put it inside a bag and again he mixed it up three times and then he took whatever was there left and he mixed it, then he put it there, he checked it, he tasted it and it was good.

did he say to you in return?

A (Through interpreter.) He was aware of the fact that I was on parole and he threatened to let it be known what I was doing.

I don't know whether he was joking or he was being true about it, but every week he threatened me with a parole.

Q Did you believe that he would tell your parole officer that you were dealing in cocaine?

MR. MAHLER: I object to that question.

THE COURT: Sustained.

Q Mr. Miranda, did you receive a phone call on or about the 5th of November, 1973?

A YEs.

Q Who did you receive that phone call from?

A I received that phone call in my house.

Q Who did you receive it from?

A From Mr. Diaz.

Q Have you ever spoken to Mr. Diaz on the telephone before?

A No, he just told me to come down to 239 South 4th Street.

Q Have you ever spoken to him on the phone previous to November 5, 1973?

Q Did Mr. Diaz call?

A Yes. I was at the restaurant when Fiffe came and told me that the call had been received and that I should go to Juanita Guzman's house to pick up a package.

(Continued next page.)

Q Did you see anyone dividing up the cocaine into packages?

A Yes.

Q Who was that?

A Mr. Diaz.

Q What did you see him do, exactly?

A He separated one-eighth of cocaine, put it on one side and the rest he stored it.

Q Mr. Miranda, I will direct your attention to November 12th, 1973. Did you have occasion to meet with Mr. Diaz on that day?

A Yes.

Q And when and where did you first see him on November 12th, 1973?

A It was all morning together.

Q Where were you?

A (Through interpreter.) He came to my house to pick me up and we spent all day together.

Q Did you have a conversation with him on the morning of November 12th, 1973?

A We were together and we went to the store. Then Mr. Fiffe told him that there was a business. Mr. Diaz left the store and he told Fiffe that in five minutes he was going to call back. He left me there waiting for the call.

package?

A One-eighth.

Q What type of a package was it?

A It was in a plastic bag. She put it inside of a box.

Q Do you recall what kind of a box it was?

A It was a small box like the same box of a package of cigarettes.

Q You say you went to the store; is that correct?

A Yes.

Q When you got to the stroe with the package what happened?

A I bring the package to the back room and to give it to Mr. Fiffe.

Q Did you give it to Mr. Fiffe?

A Yes.

Q After you gave it to Mr. Fiffe, what did you do?

A I stood in the front of the store. (In Spanish.) I was waiting in front of the store, I was in the store, I was waiting. Fiffe exited, he had a conversation with me. He then told me that they were waiting for Victor Blanco and Bobbys.

Q Do you mean Barry?

mm/nc
aml

DIRECT EXAMINATION

BY MR. KIMELMAN: (Cont.)

Q Did you go to JUanita Guzman's house?

A Yes.

Q Was that at 239 South Fourth Street in Brooklyn?

A Yes.

Q What happened when you got to Juanita's house?

A Fiffe called up Juanita telling her that I was on my way and to be ready with the package. When I arrived Juanita gave me the package and I left the house at 239 South Fourth Street to go to the store.

Q When you were at Juanita's apartment, did she tell you that Fiffe had called?

A Yes.

Q What did she tell you Fiffe had said?

A That Fiffe had called, so that she was going to be ready.

Q And did she give you a package at that time?

A Yes.

Q Did you see what was inside that package?

A Yes.

Q What was inside that package?

A Cocaine.

Q Do you know how much cocaine was in that

A (Through the Interpreter.) He spoke to Fiffe, we got into the car and we went to a garage. He finished his conversation with Fiffe and then he said to me, "Felipe, come, we are going to a garage, a body and fender shop," he said. We went there to pay some money because the truck was being repaired.

Q Did you have a discussion with Mr. Diaz about the delivery that you had just made?

A No.

Q Mr. Miranda, have you talked with Victor Blanco and Manuel Fiffe since they have been arrested?

A (Through the Interpreter.) Yes, we were together, we talked.

Q And if you talked to them, have you talked to them about this case?

A What we have been talking about was a conspiracy, but that's all.

Q Did you ever discuss your testimony with them?

A No.

Q Did they ever discuss their testimony with you?

A No.

Q Have you ever spoken to me before you testified today?

A (Through the Interpreter.) Yes.

Q When was the first time that you and I talked?

A (Through the Interpreter) I don't remember the date. I don't remember what date it was.

Q Do you know approximately how long it was?

A I don't remember exactly, approximately three weeks or a month ago.

Q And do you recall who else was present when we first talked?

A (Through the Interpreter.) You mean present? I spoke to you and I believe there was another man there, I believe it was Barry.

Q Did you ever have a discussion with me in the presence of your lawyer?

A (Through the Interpreter.) Once in order to make the agreement about the other charges. My lawyer was present and the other lawyers of the other guys were also present.

THE COURT: When you speak in Spanish, Mr. Miranda, try to speak loud enough so that the Interpreters sitting at counsel table hear what you say in Spanish.

Q How many times have you met with me?

A (Through the Interpreter.) Twice, that's all.

(The following occurred at side-bar.)

MR. KIMELMAN: Is it my understanding that we will stop proceedings today at 4:00 o'clock?

THE COURT: No. I had another judge taking that case so I won't have to suspend at 4:00 o'clock. How long do you think the case will go?

MR. KIMELMAN: If we can have a ruling on that search warrant, I will have a chemist, somebody to speak on the chain of custody.

THE COURT: I have indicated that if the search is good, the evidence is admissible. I think it is relevant. I have only one question. That is whether it can be charged against the other defendants.

You are assuming that the testimony that would be offered is that the scales were just normal scales, not used in the drug trade and had no traces of cocaine.

MR. MATARAZZO: No, your Honor. What I am assuming is that this indictment, on Count One for a conspiracy is from 31 of October, 1973, to the 1st day of May, 1974. That's what it says here.

THE COURT: On or about.

MR. MATARAZZO: Yes.

THE COURT: Said dates being approximate.

MR. MATARAZZO: Yes, you can stretch approximate to 1999 if you like.

THE COURT: I don't think so.

MR. MATARAZZO: Where does it stop?

THE COURT: Within a reasonable time.

MR. MATARAZZO: You are going to hold that June 14th he --

THE COURT: I am not sure but I might charge the Jury that they can fix the date of termination -- I'm sorry. I shouldn't say that. I am certain of nothing.

What is apparent to me is that none of these defendants were under arrest and in custody pursuant to this indictment.

MR. KIMELMAN: If I may, I think I may have to correct the Court.

My understanding is that Mr. Bermudez was arrested on June6, Mr. DePetris came before the Court while Mr. Bermudez was still in New Orleans, asked the Court to fix bail at $250,000 for Mr. Bermudez on the sealed indictment. Mr. Bermudez was held in custody in New Orleans and not transported up here until the 21st of June where he was arraigned before

your Honor on the indictment. But your Honor had fixed bail in this case on Mr. Bermudez on the 7th of June of 1974, although he was physically not before you.

THE COURT: When was he released?

MR. KIMELMAN: A week before the trial on Mr. Sutton's application to reduce bail.

MR. SUTTON: You are referring to the bail release, your Honor?

THE COURT: He has been in jail until recently. Being in jail doesn't necessarily mean that the conspiracy terminated. I have seen conspiracies go on in jail.

MR. KIMELMAN: I'd say the Government does not intend to present any evidence that would indicate by direct testimony that Mr. Bermudez did anything in jaul.

THE COURT: That's one phase of it. I think you have the weaker point among the three lawyers because the possession of scales that show traces of drugs or other paraphernalia used in the trade in the possession of the defendant after the conspiracy might very well be an admission that he was part of the conspiracy. The fact that he was in

possession of paraphernalia used in the trade, might be used by the Jury to infer that he was indeed a part of the operation.

Do you intend to use the scales and anything else?

MR. KIMELMAN: There are scales, a heat sealer, lactose, boric acid, a .35 caliber revolver with ammunition, cocaine, traces of cocaine in a vial and I believe traces of cocaine in a bag.

THE COURT: You're shaking your head. I have admitted guns that were ceased with cocaine because we know it's part of the business to protect the cocaine.

MR. MATARAZZO: Will I get a chance to say something?

THE COURT: Sure.

MR. MATARAZZO: The introduction of any one of these articles taken from the home under a search warrant of my client will so prejudice this Jury that even though in the -- even though there is no proof that can ever be given that those articles were used, were intended to be used or actually used in this sconspiracy will so prejudice this Jury against my client, he doesn't stand a chance as a

a snowball in Hades.

THE COURT: That's because the proof is against him.

MR. MATARAZZO: This search warrant has nothing to do with this case. He was arrested on that search warrant for the possession of those articles. That's a different case. To use it here would be error.

It is prejudicial and has nothing to do with this case. This case ended on the 1st of May, 1974. You are now 44 days later. That is stretching the rubberband until it must break.

MR. SUTTON: Does the Government intend to prove that these items were identifiable with Diaz-Martinez?

THE COURT: If this were a conspiracy that would be a Jury question. It is whether Mr. Vivas had articles --

MR. SUTTON: Did he have them?

THE COURT: If it was in the conspiracy and did he use them.

MR. SUTTON: I just asked if he had the control --

THE COURT: You say you don't have a chance to answer. I cannot finish.

I will not allow the gun to be used, there is

no showing that the gun was used with reference to this business. No proof. I will allow the scales to be used, the vial, and you say the vial shows traces of cocaine?

MR. KIMELMAN: Yes, sir.

THE COURT: Anything else?

MR. KIMELMAN: I think there is a bag --

THE COURT: You said lactose and boric acid. I will allow that. And a heat sealer.

MR. KIMELMAN: I believe the actual cocaine traces that were found --

THE COURT: I said that.

As a matter of fact, I think that's the most significant part of the offer. I am not sure at this point whether I will allow it to be used against the others or allow the fact question to go to the Jury as to whether the conspiracy was still in existence.

MR. MATARAZZO: May I state for the record, once this Jury has been told that my client had physically in his possession in his home a trace of cocaine, you are now placing me in a position -- this case I can never win.

Now, when the other charge comes up, I am in

double jeopardy because I have been found guilty of conspiracy for the same cocaine that I am going to be tried for later.

THE COURT: You take that charge up later.

MR. KIMELMAN: Mr. Vivas has only been arraigned on a complaint.

THE COURT: Your argument that this is the evidence that will convict your defendant may be one of the arguments for introduction into evidence.

Do you think it should be kept out because it would convict your defendant?

MR. MATARAZZO: Because it would place my defendant in double jeopardy.

THE COURT: It's a little too early to bring that up. I find this is some proof that he was a member of that conspiracy, and the Jury may disregard it.

You don't think it's necessary for the Jury to find -- well, they can find that he had it and it was in use during the term of the conspiracy. It would show he was a member of the conspiracy.

MR. MATARAZZO: It will not.

THE COURT: I say it is some testimony to prove he was a member of the conspiracy.

MR. MATARAZZO: I wish the record to show that during this trial everything is getting to that Jury being then cut out and they are told to disregard it. They will never disregard it. Once that Jury hears my client's name in connection with cocaine on June 14th, that is so prejudicial they will then relate it to a conspiracy six months before, November 20th to June 14th, that is unreasonable.

THE COURT: I find that even if the articles were seized after the conspiracy, it may be admitted to show --

MR. MATARAZZO: How much after? This is seven months after.

THE COURT: With reference to your question, there is some seizures that take place a year after. It has some relationship to the conspiracy. Time is only one factor.

MR. MATARAZZO: At any time during the days this matter has been before the Court, has at any time a conspiracy been shown, hinted at, alleged, after December of 1973? Any testimony by anybody --

MR. KIMELMAN: Yes, sir.

THE COURT: Something in April, I thought.

MR. KIMELMAN: Agent Abbott testified he

went to Mr. Vivas and asked him if he was still in the business and he said yes.

MR. MATARAZZO: Now he is testifying. You can go back to the record.

MR. KIMELMAN: He can look at the record.

THE COURT: You can bring your man in.

MR. KIMELMAN: Shall I bring in the chemist?

THE COURT: Obviously there is a real question as to whether there was anything in the vial.

Same chemist?

MR. KIMELMAN: No, a different one.

MR. MAHLER: May we put our objections in the record?

THE COURT: You will even object if I hold the conspiracy has terminated and can't bind the others; right?

MR. MAHLER: Yes, I would.

THE COURT: You do, too?

MR. SUTTON: I ain't saying nothing.

(Luncheon recess.)

A (Through Interpreter) May to June '73, one month.

Q And then, how were you employed after that?

A (Through Interpreter) My wife was collecting Welfare at the time and I had no job and I was placed on the budget. And then, in the month of August, Mr. Diaz gave me work.

THE COURT: When you answer in Spanish, please speak loudly enough so the interpreters can hear you. They want to hear what you have to say in Spanish.

Q You went to Mr. Diaz-Martinez and asked him for work, didn't you?

A (Through Interpreter) I went to see him as a friend to say hello because I did not have work. I went to see him. Then, he told me that I should come back to see him another time if there was something he would give it to me.

Q Did you return to him?

A (Through Interpreter) I used to go there all the time. I would go every day at 9:00 a.m. in the morning until he gave me work.

Q What type of work was he giving you?

A (Through Interpreter) I was a salesman for clothing.

Q Now, what month did you start selling clothes?

A (Through Interpreter) He gave me my job starting August 1st. First I was doing deliveries and picking up clothing. But then, later on I stayed in the shop because I knew the prices.

Q And was Mr. Fiffe working there at that time?

A (Through Interpreter) Yes.

Q Were you a friend of Mr. Fiffe's?

A I met him and --

MR. MAHLER: Judge, can we have the question reread?

THE COURT: If you want a yes or no answer, please direct that to the witness.

Q Would you answer me, yes or no. Were you a friend of Mr. Fiffe's?

THE COURT: If you can't answer it, yes or no, say you can't answer it.

A Yes, we were friends.

Q Now, were you on Welfare at the time in September, August of 1973?

A '73, in August, yes.

Q And did you drive a car at that time?

A Yes, my brother-in-law's car.

Q Was this a Cadillac?

CROSS-EXAMINATION

BY MR. MAHLER (Cont'd):

Q Did you get money from this?

A Yes, the customer gave me something to hold the package.

Q What did you keep?

A About $15.

Q And you turned over all the money?

A Yes.

Q When was this?

A When?

Q Yes.

A Are we talking of 1974 or 1973, now?

Q Did you tell Mr. Kimelman about this?

A About what?

Q About what you just told me?

A I said is this 1974 or 1973 because we put clothing stand in 1974.

Q You are telling us you sold cocaine from the clothing stand or you kept cocaine at the clothing stand; is that right?

A (Through the interpreter) After that, after the sale was made, he brought two or three packages to keep there.

Q When was that?

A That was in March and July. In July of 1974.

Q Weren't you in jail already in July of 1974?

A Yes. In July of 1974 I was in prison.

MR. MAHLER: That's all I have.

THE COURT: Any redirect?

MR. KIMELMAN: No.

THE COURT: Anything further?

All right, you may step down.

MR. KIMELMAN: May we have a recess, your Honor?

THE COURT: We will take a five-minute recess.

(Recess taken.)

MR. KIMELMAN: The Government calls James Stafford.

J A M E S S T A F F O R D , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. KIMELMAN:

Q By whom are you employed?

A New York Telephone Company.

Q In what capacity?

A Investigator.

Q Are you here pursuant to a subpoena directing you to produce all records listed to a particular phone number?

A Yes.

Q Tell us what that phone number is.

A 387-7180.

Q In connection with that subpoena, did you obtain those records?

A Yes.

Q Where did you obtain those records from?

A New York Telephone Company business office.

Q Are the records that you obtained kept in the ordinary course of business by the telephone company at the business office?

A Yes.

Q Do you have those records here with you in Court today?

A I do.

THE CLERK: Document marked Government's Exhibit 9 for Identification.

(So marked.)

Q I show you what has been marked as Government's Exhibit 9 for Identification and I ask you if you can determine who the subscriber of that telephone number is.

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A Yes. J. Diaz.

Q Can you determine from your records, Government's Exhibit 0 for Identification, the address where that phone was installed?

A Yes, 239 South 4th Street.

Q Can you also determine from Government's Exhibit 9 as to the first name of the subscriber of that telephone?

A Yes, J-u-a-n-a.

Q Can you determine from Government's Exhibit 9 when that phone was in operation to that customer?

A Yes, it was installed on 6/12/72.

THE COURT: Is that the first name or is that an abbreviation of the first name?

THE WITNESS: I spelled the full nae, your Honor. They have in remarks, J for J-u-a-n-a.

Q Can you determine from those records if that phone is still in service?

A From these records I would say yes.

THE CLERK: Document marked Government's Exhibit 10 for Identification.

(So marked.)

Q I show you what has been marked as Government's Exhibit 10 for Identification and I ask you if that also

was part of the official telephone company records for that telephone?

A Yes.

Q Can you tell us what Government's Exhibit 10 for Identification is?

A We call it a credit card, it's actually a credit information card.

At that time a person applies for a telephone a card is made out in their name.

Q On that card, can you determine if an employer was given as a credit reference for the phone listed to Juana Diaz?

A Yes.

Q Can you tell us who was given as an employer reference?

A Boro Wide Clothing, 12 Manhattan Avenue.

Q Is there any indication from that --

THE COURT: Are you offering these documents?

MR. KIMELMAN: Yes, sir.

THE COURT: Well, offer them.

MR. KIMELMAN: In evidence at this time.

As soon as I finish questioning, I will offer them.

THE COURT: Go ahead.

MR. KIMELMAN: I will offer Government's Exhibits 9 and 10 into evidence.

THE COURT: Any objection?

MR. MAHLER: No objection.

MR. MATARAZZO: No objection.

MR. SUTTON: No.

THE CLERK: Government's Exhibits 9 and 10 previously marked for identification are now marked in evidence.

(So marked.)

THE COURT: He was reading from a document that wasn't in evidence before.

MR. KIMELMAN: I'm sorry, your Honor.

BY MR. KIMELMAN:

Q Can you determine from that document, Government's Exhibit 10 in Evidence, whether any other phone numbers are given as a credit reference?

A Yes.

Q Is there a number appearing on that document?

A Yes.

Q Tell us what that number is.

A 443-3866.

Q Were you also appearing here pursuant to subpoena asking you to bring forth all records pertaining to a

phone listed 443-3866?

A Yes.

Q Have you brought those records pursuant to subpoena?

A Yes.

Q Are those -- where did you obtain those records?

A From the New York Telephone Company business office.

ofls.

(Continued on next page.)

DRIECT EXAMINATION

BY MR. KIMELMAN: (Cont.)

Q Are those records kept in the ordinary course of business by the telephone company?

A Yes.

MR. KIMELMAN: May I have this marked for identification.

THE CLERK: Document marked as Government Exhibit 11 for identification.

(So marked.)

Q I show you what has been marked as Government's Exhibit 11 for identification and I ask you if you recognize it?

A Yes.

Q Tell us what it is.

A This is a service record card.

Q Is that the service record card for subscriber of telephone number 443 3866?

A Yes.

MR. KIMELMAN: I offer this in evidence.

MR. MAHLER: No objection.

THE CLERK: Government's Exhibit 11 previously marked for identification, now marked in evidence.

(So marked.)

BY MR. KIMELMAN:

Q Looking at Government's Exhibit 11 in evidence, can you tell us who the subscriber for that telephone is?

A Yes. It is I. Martinez.

Q Is there an address?

A Yes, 54 Jefferson Street.

Q Can you determine from Government's Exhibit 11 in evidence as to when that phone was in operation to this subscriber?

A Yes, it was installed on 3/17/72.

Q Can you determine from Government's Exhibit 11 in evidence whether that phone is still in operation?

A From these records I would say yes.

Q That's the same number that appears on the credit card, Government's Exhibit 10?

A Yes.

Q Were you also here pursuant to a subpoena requiring you to bring the telephone company records of a phone number, area 212, 857 1358?

A Yes.

Q Have you obtained those documents?

A I have.

Q Can you tell us where you obtained those documents?

A From the New York Telephone Company business office.

Q Are those documents and records kept in the ordinary course of business by the phone company?

A Yes.

Q Do you have those documents with you?

A I do.

Q Is this one document?

A Yes, there are two service cards.

THE CLERK: Two documents marked Government's Exhibit 12 for identification.

(So marked.)

BY MR. KIMELMAN:

Q I show you what has been marked as Government's Exhibit 12 for identification and ask you if you recognize it.

A Yes.

Q Can you tell us what Government's Exhibit 12 is?

A These two are service record cards.

Q Are they the service record cards for the telephone that was subpoenaed?

A Yes, 657 1358.

MR. KIMELMAN: I offer Government's Exhibit 12 into evidence.

THE COURT: Any objection?

MR. SUTTON: No.

MR. MATARAZZO: No.

THE COURT: Let it be marked.

THE CLERK: Government's Exhibit 12, previously marked for identification, now marked in evidence.

(So marked.)

BY MR. KIMELMAN:

Q Now, Mr. Stafford, I ask you to examine Government's Exhibit 12 for identification and tell the Court and jury who the subscriber for that telephone is that is in evidence?

A The subscriber is Eduardo Bermudez.

Q Is there an address listed for that subscriber?

A Yes.

Q Will you tell the Court and jury what that is?

A 90-38 170th Street.

Q And can you tell us from Government's Exhibit 12 in evidence the dates of service for that phone?

A Yes. I have a date of 10/12/73. At that time there was some work done on the telephone.

Q Can you tell from Government's Exhibit 12 in

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evidence when that phone was installed?

A No, I can't.

THE COURT: Can you tell us whether it is prior to a certain date?

A Well, as of 10/12/73, I know that that number was at 90-38 170th Street.

Q Can you tell us if there is a date when that phone was disconnected?

A Yes.

Q When was that?

A 3/27/74.

MR. KIMELMAN: I have no further questions.

THE COURT: Any cross?

MR. SUTTON: No.

MR. MAHLER: No.

MR. MATARAZZO: No.

THE COURT: All right, you may step down.

MR. KIMELMAN: May we have a side bar, your Honor?

THE COURT: The jury may be excused.

(The jury withdrew from the courtroom at 3:05 p.m.)

MR. KIMELMAN: I anticipate at the most a ten-minute delay in the next witness getting here.

THE COURT: As I remember the rule requires that the officer making a return within a certain time, but I know of no penalty for failure to make the return. Do you know of any.

MR. MATARAZZO: No. It is just that now 10 minutes before he is to testify I am told about cocaine that was seized. I didn't know cocaine was seized. The word traces is immeasurable and now I come up with 31 grams gross.

MR. KIMELMAN: It is .07 grams.

MR. MATARAZZO: That is more than a trace.

THE COURT: What is the application.

MR. MATARAZZO: Not to admit this in evidence on the ground it doesn't show on the return and that is the initial return and that is what he said he found.

THE COURT: I will now take a few minutes while you fellows sit around and discuss the law. I don't have any law on it. I'will go to the books and you will wait here until I am through. Since I am giving a lecture on law, I will say this, since you made the vigorous argument on heroin and making motions for mistrials, there is proof that appellants have engaged in a thriving marijuana business prior to the sales of heroin alleged in the indictment was quite properly allowed to be presented to the jury with appropriate

limiting instructions. The marijuana transactions were but one aspect of the heroin conspiracy for which appellants were convicted. Moreover, evidence of the marijuana dealings was relevant, even without the financial relationship, because it showed the organization and structure of the conspiracy as well as the individual role played by each conspirator whether the commodity was marijuana or heroin. In addition, the marijuana transaction had a bearing on the intent of the parties to commit the substantive crime of selling heroin. Evidence relevant to the proof of the crime is not incompetent because it discloses the commission of another and that is United States v. Stadter, et al, 336 Fed. 2d 326.

Anderson against The U. S., Fourth Circuit case, and unfortunately I do not have the cite, decided June 3rd, 1974, and I picked it up because an application for Cert. was made and decided on June 3rd. I am unsure from my notes but quoting from Lutwak and I have not got the cite, it is a Supreme Court case, thus the Court concluded in Lutwak that Acts of one alleged conspirator could be admitted against the other conspirators if relevant to prove the existence of the conspiracy even though they might have occurred after the conspiracy ended 344 U.S. F. 618. See also United States versus

Chase, 372 F. 2d 453.

Unfortunately I was just checking through Continental Baking Company but I was called back to the bench. That court cites Minner v. United States, Tenth Circuit, 57 F. 2d 506 and see Nudd v. Burrows, 91 U.S. 426, 23 and it goes through evidence admissable and the brief reference I have, what is not admissable against co-conspirators and that is all they are talking about.

The acts and declarations of a conspirator to be admissable against his co-conspirators must occur during the existence of the conspiracy and must be in furtherance of its objects, and if I read further I think the affirmative of that negative statement would show that prior and subsequent acts are admissable against the individual who performed them.

I will go back and see if I can find anything on the return. Do you have anything on it.

MR. KIMELMAN: No.

THE COURT: It would be nice if you did.

(A short recess was declared.)

(After recess, continued out of hearing of the jury.)

THE COURT: I asked my Courtroom Deputy five minutes ago to make sure you were here. Have you found

any cases that says that any item not listed may not be offered in evidence.

MR. MATARAZZO: The only case I came across counsel for the Government showed me and it said that in that particular case inasmuch as the attorney had not pleaded surprise it didn't make any difference because it could be testified to and attacked on cross-examination. That is U. S. versus Moore.

THE COURT: All rule 41-D says is that the inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or possession the property was taken if they are present or in the presence of at least one credible person other than the applicant for the warrant or the person from whose po session or premises the property was taken and shall be verified by the officer of the case and the Judge or Commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

Before this it said the return shall be made promptly and accompanied by written inventory of the property taken. U. S. against Hooper, 320 F. Supp. 507 affirmed 438 F. 2d 968, 1969, certiorari denied 400 U. S. 929. At page 509, referring to Rule 41-D, the

failure of the seizing officer to comply with these requirements and that was to make a prompt return by written inventory of the property taken and verified do not invalidate the reasonable search of Mr. Hooper's property, citing Evans against the United States, 242 F. 2d 534, Sixth Circuit, 1957, Cert. Denied, 353 U.S. 978.

I have the Evans case here if you would like to read it.

MR. MATARAZZO: I never said that the warrant was invalidated.

THE COURT: I am talking about admissibility of the evidence. That is what we are talking about when we say the warrant was invalidated, sir. Seizure is improper.

You cannot introduce it.

How else would it come into a trial?

U. S. against HoHaskins 345 F. 2d 111, 1965, return of search warrant is administerial act and any failure therein does not void the warrant.

U. S. against Greene, District of Columbia, District Court 141 F. Supp. 856, and it says the omission to make full return to the search warrant is an irregularity correctible on motion.

That is about all I can find in 25 minutes

allotted to me.

MR. KIMELMAN: I have some cases.

U. S. versus Averell, 296 F. Supp. 1004 and it is an opinion by Judge Judd of this Court where he says: The return of the warrant is simply an administerial act and U. S. versus Moore directly on point, 452 of F. 2d 569 which is a Sixth Circuit Court of Appeals opinion 1971 and if I may read to you or show you the paragraph.

THE COURT: Read it into the record.

MR. KIMELMAN: It is further contended on page 572, it is further contended that exhibit 11 should have been excluded because it was not included in the inventory accompanying the return of the warrant.

Appellant cites no authority in support of this motion, although it is clear that the return of the warrant is administerial and any failure therein does not void the warrant citing Rose versus U. S. 274 F. 245, 250-251 Six Cert. denied 257 U.S. 655 and the precise issue presented appears to be a first impression at the Court of Appeals level.

Appellants urge that the failure to include the item on the inventory while not sufficient to invalidate the warrant requires exclusion of the items admitted. They failed to demonstrate that the failure to list

exhibit 11 was prejudicial. The record shows that defense counsel had an adequate opportunity to cross-examine the agents as to the location of exhibits 11 and the reason for its admission exploring the possibility that the document was in an automobile outside the laboratory and contested its association with the defendants.

Defense counsel do not claim surprise at its introduction or request additional time to meet this issue. Without such a showing we decline to hold the admission of exhibit 11 to have been reversible error. U. S. Versus Moore, Cert. denied at 92 Supreme Court 2435.

THE COURT: I am convinced that the authorities will not preclude the admissibility of evidence lawfully received because it is not specified in the return.

The only item that was not specified was what.

MR. KIMELMAN: Exhibit 4, a piece of yellow paper containing a small quantity of cocaine and exhibit 6.

THE COURT: Did you give me the return.

MR. MATARAZZO: Yes.

MR. KIMELMAN: Exhibit 6 which has been subsequently analyzed as boric acid.

With those two exceptions, your Honor, I believe

everything else was mentioned.

THE COURT: How many of the items that are mentioned do you intend to offer.

MR. KIMELMAN: Exhibit 5, a small glass vial with a coke spoon attached to it with traces of cocaine, exhibit 8 which is a plastic jar with a white top labelled lactose, exhibit 6 which is six 1-pound jars of lactose sealed, the scale and the heat seal and those are mentioned and all those the Government intends to offer.

THE COURT: Objection to the offer is overruled and let the search warrant be marked as the Government's exhibit.

How long did you have that.

MR. MATARAZZO: On the day my client was arraigned on this charge.

MR. KIMELMAN: Which would be June 14th.

MR. MATARAZZO: It was a Saturday after.

THE COURT: Mark it defendant's exhibit for identification.

THE CLERK: So marked as defendant Vivas' exhibit E for identification.

MR. KIMELMAN: The last three items that I mentioned, the lactose six pounds of lactose, the heat sealer and the scale were not personally seized by the

agent who will testify. He will testify that all the items were brought into the kitchen of the house and then he eremoved them to the laboratory. I understand from Mr. Matarazzo that he may contest that and if necessary I will have to bring in an additional agent who will testify he seized those items from the particular area in the house.

(Continued on next page.)

IR next

THE COURT: Did this agent seize them from their original location into the original location? He just saw them when brought into the kitchen?

MR. KIMELMAN: The agent seized them in the dining room. All items were assembled and then, taken into the custody of this agent.

THE COURT: Use your judgment. If he says he saw the other agent bring them into the kitchen and you're willing to rest on that, I'll admit it into evidence.

MR. KIMELMAN: Yes, sir.

THE COURT: I just read a case which said in order to admit evidence every possibility must be excluded. This is a case of good common sense and reasonableness. If you want to bring the agent in that's up to you. But I'm telling you I'll admit it over objection.

MR. KIMELMAN: I believe there is still an objection to be made as far as defendant Vivas.

THE COURT: Are you going to make it again? I would appreciate your not making repetitious objections. Determination was made. Next place to go is the Court of Appeals.

MR. SUTTON: Your Honor, could I for my sake have that citation that Mr. Kimelman had made to the

Court?

THE COURT: U.S. against Moore.

MR. SUTTON: I don't know the name. I just started hearing the number.

THE COURT: Mr. Sutton wants some citation. I know you gave a number of them. He doesn't know the name of the case. What is --

MR. KIMELMAN: U.S. versus Moore.

THE COURT: Is that the one?

MR. KIMELMAN: Sixth Circuit case I just read.

THE COURT: Got it?

MR. MATARAZZO: No, I just read it.

MR. KIMELMAN: 454 F. 2nd 569 and I'll have to look in there for the cert denied.

THE COURT: All right. Let's get the jury.

(The jury is brought in at 4:35.)

(The following takes place in the presence of the jury.)

THE COURT: I am sorry I was so long delayed, but we had to wait for a Government witness, and then I had some rulings to make. But I think we're ready now.

Call your next witness.

MR. KIMELMAN: Government calls James Greenan.

JAMES GREENAN, called as a witness on behalf of the Government, was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. KIMELMAN:

Q Now, sir, by whom are you employed?

A By The Drug Enforcement Administration Department of Justice.

Q In what capacity?

A Special agent.

Q How long have you been so employed?

A Approximately one year.

Q Could you tell us, sir, the training that you underwent to become a special agent in the Drug Enforcement Administration?

A I was a special agent with the U.S. Customs Service for approximately three years. Prior to that I did attend Treasury Law Enforcement School.

Q How long did you attend the school for --

A Approximately seven to ten weeks.

Q Have you participated in investigations of appeal since becoming a special agent in the Drug Enforcement Administration?

A Yes, I have.

Q How many investigations have you participated in?

A With the Drug Enforcement Administration, I -- I am more than 20 investigations.

Q And with the Bureau of Customs?

A More than 100 investigations.

Q Have some of those occasions in the investigations in the field, have they dealt with cocaine?

A Yes, they have.

Q And could you estimate for us how many investigations you have participated in in Customs Service and as a Drug Enforcement Administration agent that dealt with cocaine?

A Fifty percent of the work that I did in Customs was cocaine and narcotics. Over 100 percent of the cases in Drug Enforcement are narcotics cases. More than 80 percent involve cocaine.

Q As part of your training, sir, based on your experience, are you familiar with the implements that are used in the cocaine business?

A Yes, I am.

MR. SUTTON: Respectfully object, your Honor, as to the --

THE COURT: I can't hear you.

MR. SUTTON: I respectfully object, your Honor, at the present time. He has not yet been qualified as

knowing the implements of the cocaine business.

THE COURT: He hasn't yet expressed an opinion. He must qualify first and then, he has the right to express an opinion.

MR. SUTTON: Thank you.

THE COURT: Have you ever testified in Court before?

THE WITNESS: Yes, I have.

THE COURT: Have you ever expressed an opinion in that field as to what implements are usually used in the cocaine business?

THE WITNESS: Yes, I have.

THE COURT: How many times?

THE WITNESS: On more than five occasions.

THE COURT: In the U.S. District Court for the Eastern District of New York?

THE WITNESS: I think three were in Southern District and two in the Eastern District of New York.

THE COURT: How many times in your career have you come upon the situation where the implements were in use?

THE WITNESS: On two occasions.

THE COURT: I find this witness qualified to express an opinion on the implements generally in use

in the cocaine business.

Now, the mere fact that I qualified him as an expert witness, I qualify this witness as an expert to testify on this matter doesn't mean you must accept what he says at face value. He's to be judged like any other witness. If after he gets through you don't believe him, just disregard it. All I stated is that it may be admitted into evidence and it may come before you for your consideration and nothing more.

All right, Mr. Kimelman.

MR. KIMELMAN: Thank you.

Your Honor, at this time I would ask the Court for the same limiting instruction as to special agent Abbott whose testimony has come before this jury.

THE COURT: It's true of all expert testimony. Not just confined to this witness.

MR. KIMELMAN: Thank you.

THE COURT: As a matter of fact, I think I said something to that effect when special agent Abbott testified.

BY MR. KIMELMAN:

Q Now, as part of your training and experience, are you also able to recognize ingredients used to cut cocaine?

A Yes, I am.

Q Now, Special Agent Greenan, I draw your attention to the 14th of June of this year. Did you execute a search warrant on that day?

A Yes.

Q Could you tell us --

MR. MATARAZZO: If your Honor please, at this point I most respectfully object to the further line of questioning of this witness. Because the events which took place on June 14, 1974, are collateral and had nothing to do with either the indictment or the charges before this Court. They are collateral and prejudicial to my client.

THE COURT: The objection is overruled.

MR. MATARAZZO: Thank you, your Honor.

THE COURT: I would instruct the jury that the testimony given by or to be given by Special Agent Greenan, if you credit it is only chargeable against the defendant Jorge Vivas.

I've ruled as a matter of law that the conspiracy had expired by this time June 14, 1964 -- '74. Do you understand the theory upon which others are chargeable with acts of declarations, outside the presence of the accused are on the theory that they're partners in the

business. One acts for the other. Well, I've held as a matter of law the business has been completed by June 14, 1964, so that whatever this witness has testified to, again, Special Agent, against Jorge Vivas,cannot be charged against either of the two other accused on trial.

I have written 64 down now so many times and I can't erase it. Of course, '74.

Q Would you tell us again, Special Agent Greenan, what premises were searched on June 14, 1974?

A A one-family residence, located at 943 Belmont Avenue, Brooklyn, New York.

Q And do you know whose residence that presises are?

A Yes. The residence of Jose Vivas.

Q Was a search made of those premises?

A Yes, it was.

Q Would you tell us how many agents participated in that search, if you recall?

A More than six agents.

Q Was the entire house searched?

A Yes, it was.

Q And as a result of that search, were certain items seized?

A Yes.

THE CLERK: Object contained in plastic marked Government Exhibit 13 for identification.

Q I show you what's been marked as Government's Exhibit 13 for identification and I ask you if you recognize it.

A Yes, I do.

Q Would you tell us how you recognize that exhibit?

A My name is listed on here as a witnessing official. That's my signature. Also, my initials are on the plastic contained inside this sealed plastic container.

Q Would you tell the Court and jury when you placed your initials on the exhibit contained inside Government Exhibit 13?

A On June 14, 1974.

Q Now, would you tell us what you seized on June 14, 1974, reletive to that exhibit?

A I seized a plastic bag,contained in the plastic bag was a yellow piece of paper and the yellow piece of paper contained what I suspected was cocaine traces.

Q And is that in fact what Government Exhibit 13 for identification is?

A Yes. There was a lab report by the D.E.A.

chemist noting traces were cocaine.

Q Now, after you took possession of Government Exhibit 13 for identification, what did you do with it?

A You mean the time I found it in the residence?

Q Well, tell us -- strike my last question.

Where did you find it in the residence?

A I found it on a night table in the master bedroom of Vivas' residence.

MR. MATARAZZO: I didn't hear the entire answer, Judge.

THE COURT: Will you please read it back for Mr. Matarazzo.

(The last answer is read back by the reporter.)

MR. MATARAZZO: Objection to the term "master bedroom." It's a conclusion.

THE COURT: Overruled.

Q After you found it in the bedroom, what did you do with it?

A I brought it downstairs to the kitchen.

Q And did you maintain possession of it in the kitchen?

A There were two agents in the kitchen who maintained custody of all the evidence found in the house.

Q Now, did you eventually remove Government's

Exhibit 13 for identification from the house?

A Yes, I did.

Q And where did you take it?

A I took it back to our office located at 57 Street in Manhattan.

Q When you got to your office, what did you do with that exhibit?

A I then placed the exhibit in this plastic container and sealed it and then, I brought the sealed container to our night deposit vault and deposited it in the vault.

Q And when is the next time you saw Government Exhibit 13?

A On Monday, June 17, 1974.

Q What was the purpose of your seeing it on that day?

A I removed the exhibit from the night deposit vault. I weighed the exhibit and I got an approximate gross weight and I filled out a D.E.A. form 7A, change of custody form and I had the exhibit taken to the lab.

Q Did you take it to the lab yourself?

A No, I did not.

Q When is the next time, when you saw Government Exhibit 13 for identification?

A This afternoon I filled out a form D.E.A. 12, which is another change of custody and a letter from my supervisor stating that I could pick up this evidence and bring it to Court and I did it. Picked it up this afternoon from the lab.

(Continued next page.)

Q And have you examined Government's Exhibit 13 today?

A Yes, I did.

Q Does it appear to be in the same condition as when you brought it or when you gave it to comeone to take to the laboratory?

A Yes, it does. The only thing, it's just a little torn here. It wasn't torn when I brought it.

Q Was the seal that you placed on Government's Exhibit 13 still intact?

A Yes, it is.

Q Are there any other seals on that exhibit?

A There is a seal on the bottom here, "7/5/74". I don't know what it refers to.

MR. KIMELMAN: May I offer this subject to connection, your Honor?

THE COURT: Is there --

MR. MATARAZZO: I will object to each and every item to be introduced and to save the Court time, I will put it on the record. Each item to be introduced shall suffer the same objection. It is immaterial to this case.

THE COURT: The objection shall suffer the same right. Objection overruled.

Are you going to take each item --

MR. KIMELMAN: Your Honor, I can ask him if he repeated the same procedure without going through it.

THE CLERK: Government Exhibit 13, previously marked for identification, now marked in evidence.

xxx

(So marked.)

THE CLERK: Object in plastic marked Government Exhibit 14 for identification.

MR. KIMELMAN: If your Honor please, we heard --

THE COURT: Will you mark all the exhibits that you have there.

THE CLERK: Container with substance Government's Exhibit 15 for identification.

Another container with substance marked Government Exhibit 16 for identiification.

xxx

(Exhibits 15 and 16 so marked.)

THE COURT: I want you to mark each item separately.

THE CLERK: Object marked Government Exhibit 17 for identification; another object marked Government Exhibit 18 for identification. Six containers containing substance marked Government Exhibit 19, 19-A through E inclusive.

(So marked.)

Q Special Agent Greenan, I ask you to examine Goverment Exhibit 14 for identification, and I ask you if you recognize it.

A Yes, I do.

Q Was that item seized on the night of June 14th at the home of Jorge Vivas?

A Yes, it was.

Q Did you seize that item?

A Yes, I did.

Q Could you tell us where you found it?

A I found B, E, A Exhibit No. 5 in an upstairs bedroom of the Vivas residence. Located at 943 Belmont Avenue. I found it along with BEA Exhibit No. 4, same bedroom on the night table.

Q When you say BEA Exhibit 4, are you referring to Government Exhibit 13 in evidence?

A Yes, I am.

Q It was in the same bedroom?

A Correct.

Q Could you tell us, sir, how you recognized that exhibit?

A My initials are on the actual exhibit itself and my signature is down as witnessing official for the sealing of

the envelope.

Q Can you tell us, sir, when you placed your initials on the items contained inside that exhibit?

A On June 14, 1974.

Q Sir, can you tell us what Government Exhibit 14 for identification is?

A It's a capsule or vial with a black top and what I recognize as a cocaine spoon.

Q Now, sir, can you tell us, is that an opinion of yours based on your experience and training?

A Yes, it is.

Q Can you tell us, sir, on what you base that opinion?

A I had seen a similar spoon used on two occasions in an undercover situation and I have seen them seized on numerous occasions as part of search warrants.

Q Now, sir, is that what you call a cocaine spoon, is that attached to the vial?

A Yes, it is.

Q Now, sir, after you seized that what did you do with it?

A I brought it down to the kitchen.

THE COURT: When you seized it, was it attached to the vial?

THE WITNESS: Yes, it was.

Q And, sir, based on your experience do you know what use is made of that spoon?

A It's a -- it's an object used to ingest the actual cocaine itself.

Q Do you know how that is done, based on your training and experience?

A Yes. Well, in this case here the spoon would be dipped into the actual vial itself. As you notice, there are, it's a white traces which were found by the chemist to be cocaine. The spoon would be placed inside the vial itself and held up to the nose of the person who would ingest the cocaine.

Q Now, sir, after you took Government Exhibit 14 to the kitchen, did you follow the same procedure with that exhibit as you did with Government Exhibit 13 in evidence?

A Yes, sir.

Q Did you again bring it to court in the same manner as you did Government's Exhibit 13 in evidence?

A Yes, I did.

MR. KIMELMAN: Your Honor, I offer this in evidence.

THE COURT: Mr. Matarazzo, you indicate the same objection; same ruling. It may be marked.

I assume the other defendants haven't any

objection --

MR. SUTTON: May we participate or are we left out altogether? Are we participating here? Do we have rights to cross-examine on anything?

THE COURT: I'll give them to --

THE COURT CLERK: Government's Exhibit 14, previously marked for identification, now marked in evidence.

(So marked.)

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Q Special Agent Greenan, I show you what has been marked as Government's Exhibit 15 for identification and I ask you if you recognize that object.

A Yes, I do.

Q And was that seized by you on June 14, 1974?

A That's correct.

Q Would you tell us where you received that item?

A I seized it in the residence of Mr. Vivas. The exhibit was seized from a cabinet which is located in a dining room in the main area of the residence.

Q And, sir, can you tell us what Government's Exhibit 15 for identification is?

A It's two containers; one with a lid on it. It contains what to me at the time was a white unknown substance, which was later found by the lab to be a powder containing

borates.

Q Based on your experience and training, do you know what use is made of borates?

A Yes.

MR. MATARAZZO: Objection.

THE COURT: Overruled. I'll allow it.

A Yes. Borates or boric acid is used to dilute the cocaine; cut it up. Make one volume a bigger volume.

Q Sir, after you received Government's Exhibit 15 for identification, what did you do with it?

A I brought it into the kitchen area.

Q And did you follow the same procedure with Government's Exhibit 15 as with Government's Exhibits 13 and 14?

A Yes, I did.

Q And is it your testimony that like the two preceding exhibits, you picked it up in the same manner and brought it to the court here today in the same manner?

A That's correct.

MR. KIMELMAN: I'll offer this in evidence, your Honor, Government's Exhibit --

THE COURT: Same objection?

MR. MATARAZZO: Same objection to each and every article offered in evidence.

THE COURT: It may be marked.

THE COURT CLERK: Government's Exhibit 15, previously marked for identification, now marked in evidence.

(So marked.)

Q Now, Special Agent Greenan, I show you what has been marked as Government's Exhibit 15 for identification and I ask you do you recognize that.

A Yes, I do.

Q Could you tell us what you -- did you seize that item?

A No, I did not.

Q Could you tell us where you saw that item?

A In the kitchen of the residence of Jorge Vivas.

Q Did you see anyone else seize that item?

A No, I did not.

Q Did you see anyone bring it into the kitchen?

A No, I did not.

Q But you recall seeing that in the kitchen? Was that with the other items that were seized that you previously testified to?

MR. MATARAZZO: Objection. That question has been answered once.

THE COURT: Overruled. I'll allow it.

A Could you please repeat the question?

Q Was Government Exhibit 15 for identification in the kitchen with the other items that you have already testified to?

A That's correct, 13, 14, and 15.

THE COURT: Did you see anyone bring them into the house?

THE WITNESS: No, I did not.

Q Now, sir, do you know what Government Exhibit 15 for identification is?

A Yes. It's lactose.

MR. MATARAZZO: I object. He didn't see anyone bring it in; he saw it in the kitchen, he does not know who it belongs to. I'm not interested nor should this Court be interested in what's in that vial.

THE COURT: I'm only ruling that it is admissible. Objection is overruled.

Q Now, sir, did you follow the same procedure with reference to Government Exhibit 16 for identification as you did with the previous exhibits in evidence?

A Yes, I did.

MR. KIMELMAN: Your Honor, I'll offer this in evidence.

THE COURT: Same objection?

MR. MATARAZZO: Same objection, Judge.

THE COURT: Objection is overruled. Mark it.

THE COURT CLERK: Government's Exhibit 16, previously marked for identification, now marked in evidence.

xxx (So marked.)

Q I show you what has been marked Government Exhibit 17 for identification and I ask you if you recognize it.

A Yes, I do.

Q Did you seize that item at the home of Jorge Vivas the night of June 14, 1974?

A I was not the agent who seized the item.

Q Did you see another agent seize that item?

A No, I did not.

Q Did you see another agent in the possession of that item?

A I believe Nick Coraleva --

MR. MATARAZZO: Objection; not interested in his belief.

THE COURT: Sustained. Strike it out.

Q Did you see any agent in the actual possession?

A No, I did not.

Q When was the first time you saw that item?

A It was on the kitchen table in the residence of Mr. Vivas.

Q Was it together with the other items that you have testified to? The previous Government exhibits in evidence.

A Yes, it was.

Q Now, sir, may I ask you if you know what Government Exhibit 17 is.

A This is a heat sealer. You put it in and it heats up. And at one end you're able to slip in an open plastic bag or similar material and press it down and it will melt together and form a leak-proof seal.

Q Now, sir, based on your training and experience, is it your opinion that Government Exhibit 17 for identification is used in the cocaine business?

A Yes, it is.

MR. KIMELMAN: Your Honor, I ask that Government Exhibit 17 be admitted. Well, if I may, your Honor --

Q Did you follow the same procedure for Government Exhibit 17 for identification as you did with the other Government exhibits in evidence?

A The only different procedure is that it's left in the night deposit vault. I did take it out on the 17th of June to type up what we call a BEA form 7A, which is a chain of custody for narcotic evidence and then returned it

to the vault under that same chain of custody.

Q Did you yourself remove it from the vault today?

A Yes, I did.

Q Does it appear to be in the same condition as when you placed it in the vault?

A Yes, it is.

MR. KIMELMAN: Your Honor, I offer it into evidence.

MR. MATARAZZO: Same objection as Exhibit 16.

THE COURT: Objection is overruled and it may be marked.

THE COURT CLERK: Government Exhibit 17 previously marked for identification is now marked in evidence.

(So marked.)

(Continued on next page.)

Q I show you what has been marked Defendant's Exhibit 18 for identification and I ask you if you recognize it.

A Yes, I do.

Q Tell us how you recognize that exhibit.

A My initials are on here, on one of the evidence stickers.

Q Tell us when you placed your initials on that exhibit.

A June 14, 1974.

Q Did you seize Government Exhibit 18 for identification on the night of June 14, 1974?

A No.

Q Did you see anyone else seize that item?

A No.

Q Did you see anyone in possession of that item?

A No.

Q Where did you first see Government's Exhibit 18 for identification?

A On the kitchen table in Mr. Viva's residence.

Q Was that together with the other items that you have just testified to, Government's Exhibit 13 through 17?

A Yes.

Q I ask you, did you follow the same procedure

in respect to Government's Exhibit 18 as you did with reference to Government's Exhibit 17 in evidence?

A That is correct.

Q Is it in the same condition as when you placed it in the vault on June 14, 1974?

A That is correct.

MR. KIMELMAN: I offer Government's Exhibit 18 in evidence.

THE COURT: Same objection?

MR. MATARAZZO: Yes.

THE COURT: Let it be marked.

THE CLERK: Government's Exhibit 18 previously marked for identification now marked in evidence.

Q I wonder if you would tell the Court and the jury what Government's Exhibit 18 in evidence is?

A It is a scale.

THE COURT: Now, that Exhibit has some tabs on it and some stickers.

THE WITNESS: That is correct.

THE COURT: Did you put that on?

THE WITNESS: Yes.

THE COURT: That isn't the way you found that item?

THE WITNESS: That is correct.

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THE COURT: The same is true as to the sealer as you described it?

THE WITNESS: Yes.

Q Based on your training and experience does Government's Exhibit 18 in evidence, is that the type of scale that is often used in the cocaine business transaction?

A That is correct.

Q I show you what has been marked as Government's Exhibit 19A through 19E and I ask you if you can identify it --

THE COURT: It is 19 to 19E.

MR. KIMELMAN: 19 to 19E.

THE WITNESS: These six exhibits were seized from the residence of Mr. Viva.

Q Did you seize those exhibits?

A No, I did not.

Q Did you witness anyone seizing those exhibits?

A No, I did not.

Q Would you tell us the first time you observed those exhibits in the residence?

A On the kitchen table of Mr. Viva's residence.

Q Were those exhibits 19 through 19E on the table with the rest of the items that you have just testified to?

A That is correct.

Q Did you follow the same procedure with these exhibits as you did with Government's Exhibit 18 and 17?

A Yes.

Q Could you tell us what Government's Exhibits 19 through 19E are?

A They are six plastic containers marked Lactose and they are still factory sealed.

Q Based on your training and experience would you tell us what the purpose of Lactose is in a cocaine oepration?

A Lactose is the same as boric acid, a dilluting or cutting material for the cocaine.

MR. KIMELMAN: I have no further questions.

THE COURT: Mr. Matarazzo would you like to cross-examine first?

MR. KIMELMAN: If I may I would like to offer Government's Exhibit 19 thorugh 19E in evidence.

MR. MATARAZZO: Same objection.

THE COURT: Overruled. They may be marked.

THE CLERK: Government's Exhibits 19 through 19E previously marked for identification now marked in evidence.

MR. MAHLER: May it be cleared or clarified

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(Out of the hearing of the jury.)

MR. KIMELMAN: I don't see the chemist here yet.

I was just about to call my secretary. I instructed him to be here at a quarter to 10:00.

(The jury entered the courtroom at 10:05 a.m.)

THE COURT: Good morning, I think we are ready to start.

Now, will you call your next witness.

MR. KIMELMAN: Yes, sir.

Dr. John Sawinski.

J O H N S A W I N S K I , called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KIMELMAN:

Q By whom are you employed?

A U. S. Department of Justice, the Drug Enforcement Administration.

Q What is your occupation?

A I am a forensic chemist.

Q For how long have you been a forensic chemist?

A Approximately five and a half years.

Q Briefly describe your duties for us.

A My duties basically are to analyze narcotics and dangerous drugs.

Q Tell us what training you have had for your present occupation.

A I had been a toxicologist for Nassau County for two years prior to coming to the DEA and at DEA I received training to do analyses of narcotics and dangerous drugs.

Prior to all of that I received a B.S. in Chemistry and Ph.D. in Chemistry.

Q Have you testified in court as to the analyses of narcotic substances?

A Yes, I have testified in Federal, State and local courts.

Q On approximately how many occasions?

A Approximately 20.

Q Were you qualified as an expert in analyzing such substances on all of those occasions?

A Yes.

MR. SUTTON: Objection.

THE COURT: Overruled. I will allow it.

I find the witness qualified to express an opinion as to the identity of narcotic drugs.

MR. KIMELMAN: Shall I proceed, your Honor, or is there a voir dire?

THE COURT: No, I have found the witness qualified.

BY MR. KIMELMAN:

Q Sir, I show you what has been marked Government's Exhibit 13 in evidence and I ask you if you recognized it?

A Government's Exhibit 13 I recognize by my initials,JPS,and the date 7/3/74.

Q Did you place your initials on that exhibit on that date, sir?

A Yes, sir.

Q Can you tell us, sir, the circumstances under which you saw and placed your initials on Government's Exhibit 13 in evidence?

A Well, I would have received -- I received this evidence from the supervisory chemist on that date to do the analysis.

Q When you received Government's Exhibit 13 in evidence, what did you do with it?

A I cut this end open, took out the contents of the envelope, plastic envelope, analyzed the contents.

Q And after you analyzed the contents of Government's Exhibit 13 in evidence, did you analyze the contents

by performing certain tests?

A Yes, I did.

Q After you performed these tests, have you reached an opinion as to the contents of the substance contained in Exhibit 13 in evidence?

A Yes, I did.

MR. SUTTON: Shall we reserve all possible voir dire to cross-examination?

THE COURT: Voir dire relates to the competency of the witness to testify, his qualifications. Cross-examination challenges his credibility.

MR. SUTTON: I understand that, your Honor.

THE COURT: So when you are talking about his credibility, of course, you can cross-examine him.

MR. KIMELMAN: May I have the last question.

(Last question read.)

BY MR. KIMELMAN:

Q Sir, could you tell us what your opinion is?

A My opinion is that the contents of this envelope contained 6.6 percent cocaine hydrochloride and lactose.

Q Could you tell us how much cocaine hydrochloride, the net amount, was found in Government's Exhibit 13?

A The net weight was 480 milligrams.

Q Would you say that is a trace of cocaine, sir?

A Yes.

Q After you performed your tests and reached your opinion, what did you do with Government's Exhibit 13 in evidence?

A I placed a seal on it and I resealed it using a heatsealing machine.

Q I ask you to examine Government's Exhibit 13 in evidence and I ask you if it is in the same condition as when you placed it -- strike that. After you placed the seal on it, what did you do?

A I returned it to our vault.

Q I ask you to look at Government's Exhibit 13 in evidence and I ask you if it is in the same condition as when you placed it in the vault?

A Yes, it is.

Q Now, Dr. Sawinski, I show you what has been marked as Government's Exhibit 14 in evidence and I ask you if you can identify it?

A Government's Exhibit 14 I can recognize by my initials, JPS and the date, 7/3/74.

Q Did you place your initials on that exhibit on that date, sir?

A Yes.

Q Could you tell us under what circumstances you received Government's Exhibit 14 in evidence?

A Government's Exhibit 14 I received from the supervisory chemist on that date.

Q After you received that exhibit, what did you do with it?

A I opened one end of the envelope and removed the contents to analyze it.

Q Did you perform certain tests on the contents?

A Yes.

Q As a result of those tests have you formed an opinion as to what the substance inside Government's Exhibit 14 in evidence is?

A Yes.

Q Could you tell us what that opinion is?

A The contents of Government's Exhibit 14 contained 18.3 percent cocaine hydrochloride and lactose.

Q What was the net amount of cocaine hydrochloride found in Government's Exhibit 14?

A The net amount was 70 milligrams.

Q Could you tell us where you found the substance that you are talking about?

A Well --

Q Where in the exhibit?

A The powder was in the small vial.

Q Is that the substance, a portion of that substance that you made your test?

A It is, yes.

Q After you performed the test and reached your opinion what did you do with Government's Exhibit 14 in evidence?

A I placed a seal on it and resealed it, using a heat-sealing machine.

(continued next page.)

DIRECT EXAMINATION

BY MR. KIMELMAN: (Cont'd.)

Q After you did that, what did you do with the exhibits?

A The exhibits then was returned to the vault.

Q I ask you to examine Government's Exhibit 14 in evidence and ask you if it is in the same condition as when you replaced it in the government vault?

A It is.

Q I show you now what has been marked Government's Exhibit 16 in evidence and I ask you if you recognize that exhibit?

A Government's Exhibit 16 I recognize by my initials, JPS, and the date 7/9/74.

Q Did you place your initials on that exhibit on that date?

A Yes.

Q Again, would you tell us the circumstances under which you received Government's Exhibit 16?

A Government's Exhbiit 16 was given to me by the supervisor chemist on that date.

Q After you received Government's Exhibit 16, what did you do with it, sir?

A I opened one end of it, removed the contents

which in this case is a plastic bottle and analyzed the substance.

Q You analyzed the substance inside the bottle?

A Yes.

Q Did you perform certain tests on that substance?

A Yes.

Q Have you reached an opinion as a result of those tests as to what that substance was?

A Yes.

Q Could you now tell us what your opinion was?

A The contents I found in this case, if I had a copy of my lab notes, I could correlate with this one.

Q Now, sir, I show you what has been marked as Government's Exhibit 3500-20 and ask you if that refreshes your recollection as to what was contained inside Government's Exhibit 16?

A Yes, it does. Although the plastic bottle is labeled lactose, I found the contents of this plastic bottle to contain borates.

Q What is the quantity of borates that you discovered inside that exhibit?

A I did not quantitate the exhibit.

Q After you performed your tests and reached your opinion, what did you do with Government's Exhibit 16

in evidence?

A I placed a seal on the exhibit and I heat sealed the exhibit with our heat sealing machine.

Q And after you heat sealed, what did you do with it?

A I returned it to our vault.

Q I ask you to examine Government's Exhibit 16 in eveidence and ask you if it appears to be in the same condition as when you placed it in your vault?

A It is in the same condition.

MR. KIMELMAN: No further questions.

MR. MATARAZZO: At this time I move to strike out all the testimony of the chemist on the grounds set forth before this Court yesterday.

THE COURT: Motion denied.

Do you have any cross-examination, Mr. Matarazzo?

MR. MATARAZZO: I have no questions, your Honor.

MR. SUTTON: I do, your Honor.

CROSS-EXAMINATION

BY MR. SUTTON:

Q My name is Charles Sutton, Dr. Sawinski. Can you tell me, sir, for how long a period of time you

1 MR. MAHLER: I have tried to fit the evidence adduced here into the categories of one or more of the types of existent conspiracy that I have known and read of. I do not think these facts fit into that. I think you have two separate and distinct conspiracies.

The first conspiracy begins on or about November 5, the buyer is Mr. Abbott and the connection and the connection is Bianco and the deliveryman is Fiffe and Miranda, and the alleged supplier is Diaz-Martinez.

I think the evidence supports this, there is a completely separate individual and apart from the conspiracy.

If you believe the facts in conspiracy No. 2 whereby the buyer is the agent Abbott, connection Bianco, deliveryman is Fiffe and perhaps they paint Vivas into that role and the supplier is Bermudez, one thing is clear here, the Bermudez and Vivas people have nothing to do with the Martinez nor does the conspiracy interrelate or connect in any way with the conspiracy No. 2. I think they are two parallels but separate and individual conspiracies.

I would again urge you to sever my client's case from the case.

THE COURT: Motion to sever is denied.

Any other motions?

MR. MAHLER: Yes. I would like to move under the circumstances of the trial for a mistrial at this point. I think my client, and for a severance again on the ground that my client could not possibly be accorded a fair trial under the circumstances and in the atmosphere of this trial. He is not charged directly with possessing any contraband substance.

Again he is charged only in a conspiratorial way.

THE COURT: Only he is shown with possessing cocaine, not charged.

MR. MAHLER: Not directly. I don't believe there --

THE COURT: Just his employees, Mr. Miranda and Mr. Fiffe.

MR. MAHLER: As part of the conspiracy.

THE COURT: Yes.

MR. MAHLER: That is the --

THE COURT: The Government should have taken my suggestion and obliged you and put all the possession counts in.

There is more evidence at different times than the other two defendants.

3 You say the charge against them prejudiced you?

MR. MAHLER: That is correct.

THE COURT: Just because it wasn't charged.

MR. MAHLER: We have had a day and a half of testimony concerning the evidence on the table of cocaine.

THE COURT: Which is all part of the conspiracy.

MR. MAHLER: Of which conspiracy?

THE COURT: Motion denied. Anything further?

MR. SUTTON: May we have five minutes?

I have to make a telephone call.

THE COURT: Yes, be ready to proceed in five minutes.

(Short recess.)

MR. MAHLER: I further move to dismiss the indictment for failure of the people to prove a prima facie case.

THE COURT: Motion denied.

Now, are we ready?

MR. SUTTON: Yes.

(The jury entered the courtroom at 11:35 a.m.)

(Continued on next page.)

F R A N C I S C O R I V E R A , having first been duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. MAHLER:

Q Mr. Rivera,, do you speak English?

A Not too much, a little.

Q Will you try to answer the questions in English and if you can't will you tell us?

A It's better in Spanish, it's better for me,you know.

THE COURT: Why don't you try English and then if you have any difficulty turn to Mr. Guna and ask him what it is?

If you don't understand the English question, don't answer it, turn to Mr. Guna and ask him to translate it.

All right?

Is that all right with you?

THE WITNESS: It's better if he can translate for me.

THE COURT: Well, I usually leave it up to the witness.

It is up to you, Mr. Mahler.

MR. MAHLER: All right.

Q If you understand my question first in English, you can answer it in English: right?

Where were you from originally?

A (Through Translator) From Puerto Rico.

Q How long have you been in this country?

A About 13 years.

Q I mean by that how long have you been in New York

A Here in New York, 13 years.

Q Now, have you ever been convicted of a crime?

A Well, no.

Q Where were you employed in September of 1973?

A Working in a company, the address is 523 Kent Avenue, I worked part-time for Mr. Diaz.

Q And how long -- what is the name of the company that you work for?

A Strantant.

Q How long do you work for that company?

A About 11 years.

Q Eleven years?

A Yes.

Q What do you do for them?

A (Through Translator) I'm an adjuster.

Q Now, did there come a time when you began to

work part-time for Mr. Diaz-Martinez?

A Yes.

Q When was that?

A I work in delivery for a customer.

Q Were you working there in September 1973?

A September, I working for Mr. Diaz May '72.

Q Until when?

A When, that is the store in Manhattan Avenue, that is in Brooklyn.

Q Were you working for him in September 1973?

A Yes, sure.

Q Were you working there in October also?

A What year October?

Q 1973.

A Yes.

Q Now, did you work at the store, at 239 Grand Street, Brooklyn?

A Yes.

Q What did you do there?

A (Through Translator) My duty was to take clothes to the customers.

Q Do you know a man named Luis Felipe Miranda?

A Yes, I remember that one day Felipe, I don't know the second name, I don't know, I know who is Felipe --

Q Now, how long do you know him?

A Felipe?

Q Yes.

A One year, one year, yes.

Q Now, did you ever have occasion to work with him?

A (Through Translator) I work in his store with him, yes, I work in his store.

Q Now, in September of 1973 or October, you tell me, did there come a time when you took a ride with him, Mr. Rivera?

A I make one delivery Maury Street or Avenue, I don't remember the street, I know it's a big market.

Q And when was this, was this in September 1973?

A Yes.

Q And did you have a conversation with Mr. Felipe during that trip?

A Yes, in the station wagon.

Q What was the conversation about, would you tell us?

A Yes --

Q THE COURT: Don't answer the question.

MR. KIMELMAN: Objection, objection.

THE COURT: Would you like to argue this,

Mr. Mahler?

The jury may be excused.

(At 10:40 o'clock a.m. the jury left the courtroom.)

MR. KIMELMAN: Your Honor, I would object on the grounds of hearsay.

THE COURT: Well, when was that conversation, you say?

MR. MAHLER: September of 1973.

THE COURT: On what grounds do you think it is admissible?

MR. MAHLER: I think it is admissible -- well, I think it is admissible on the credibility of Mr. Miranda's testimony, I think --

THE COURT: No, a foundation must be established first to admit a conversation between a witness and another witness.

MR. MAHLER: Well, he is not just another witness, he is a part of the conspiracy, Mr. Miranda is a defendant in the conspiracy.

THE COURT: When did the conspiracy start?

MR. MAHLER: The conspiracy started October 31, 19 --

MR. KIMELMAN: 73.

BY MR. MAHLER:

Q Now, could you recall for us, Mr. Rivera, an occasion when you took a certain ride, delivery ride with Mr. Felipe Miranda?

A (Through translater.) Yes.

Q And did you have a conversation with him during that trip?

A Yes.

Q And what did he say to you and what did you say to him?

THE COURT: Objection sustained.

I want specific questions.

Did you talk about cocaine?

Yes or no.

THE INTERPRETER: Yes, he said.

THE COURT: And what did he say to him -- what did you say to him about cocaine?

THE WITNESS: (Through translater.) I said to him that I didn't use it, that I didn't use that.

And he said to hme, "Please don't tell this to Mr. Diaz because Mr. Diaz will fire me."

And I said, "Well, it's all right."

And he said to me, "But if you ever decide to steal some clothing" --

S Rivera-direct

THE COURT: Strike that out, I said about cocaine.

BY MR. MAHLER:

Q Mr. Rivera, Mr. Rivera, would you start and relate to us the beginning of the conversation relating to cocaine?

A (Through interpreter.) I was driving the car to deliver the merchandise, then he took that out of his pocket, an aluminum foil, and then he put something in his nose, and he gave me some and I asked him what is that.

And he said to me that would make people happy.

Q What did you say?

A (Through interpreter.) I said to him, "I don't use that."

Q What did he say, relate to us the rest of the conversation?

A (Through interpreter.) And he said to me, "Please don't say that to Mr. Diaz because then he would fire me from my job."

Q Who said that?

A (Through interpreter.) Felipe.

Q And did there come a time when he gave you a card?

A (Through interpreter.) Yes, he gave it to me.

Q And what did he say in connection with the card?

A (Through interpreter.) He said to me if I were to steal something from Mr.Diaz --

MR. KIMELMAN: Objection.

THE COURT: Strike it out.

Q Would you please tell us what he said in connection with the card relating to cocaine?

A (through interpreter.) If I were to know of somebody that would use that, that I was to call him or gave that people the telephone number to call that place.

Q Now, did he give you a card?

A (Through interpreter.) Yes, I have it, I had it in my house and I have it here, I brought it along with me.

(A card was then handed to Mr. Mahler who then offered it to Mr. Kimelman.)

MR.KIMELMAN: Thank you.

MR. MAHLER: May I offer this into evidence.

MR. KIMELMAN: May I have a voir dire.

THE COURT: May I see it?

(The card was handed to the Court.)

(Continued next page.)

A Yes.

MR. KIMELMAN: No objection.

THE COURT: Only the face of the card is admitted in evidence. This witness made it clear he wrote on the back.

Let it be marked.

THE CLERK: Defendant Diaz-Martinez' Exhibit P previously marked for identification now marked in evidence.

(So marked.)

(Conclusion of voir dire examination by Mr. Kimelman.)

THE COURT: May I see that card, please?

THE CLERK: Yes, sir.

(Document handed to Court.)

(Pause.)

MR. MAHLER: Shall I continue, your Honor?

THE COURT: Surely.

DIRECT EXAMINATION

BY MR. MAHLER (continuing):

Q Had you ever seen cocaine prior to that day, from Mr. Miranda?

A Who is Miranda?

Q Felipe.

A No.

Q Did you work at --

MR. MAHLER: Withdrawn.

Q Did you have occasion to be in the store at 293 Grant Street, Brooklyn, during the month of October 1973?

A Yes, because I work there with Mr. Diaz.

Q Did you work there steadily from October 1973 through April 1974?

A Yes, because when the store was moved, yes, I was working there.

I started to work with him since he was in Manhattan.

Q Did you ever at any time see Mr. Diaz-Martinez with cocaine?

A No.

Q Now, would Mr. Diaz-Martinez stay in the store during the day -- would he stay there all day?

A Mr. Martinez?

Q Mr. Diaz-Martinez.

A Well, once in a while he would also have to go and deliver merchandise.

Q Did you stay in the store during the day?

A In the afternoon when I left the work, I would make deliveries.

Q Is it correct to state you would go in and out of the store during the day?

A Yes, I would go in and out.

Q Would Mr. Diaz go in and out of the store during the day?

A Yes.

Q And do you know Mr. Fiffe, do you know Manuel Fiffe?

A Fiffe?

Q Fiffe.

A Yes.

Q And do you know if Fiffe worked in the store between October 1973 and October 1974?

A Yes.

Q Do you know if his job was in the store?

A Yes. He would have to wait on customers and give me orders.

Q Was he the one who was the inside man, the man who stayed in the store almost all day?

A Yes. He would be waiting on the store -- on people.

MR. MAHLER: I have no further questions.

MR. KINELMAN: May I have the card, your Honor?

(Document handed to counsel.)

MR. KIMELMAN: Thank you.

CROSS EXAMINATION

BY MR. KIMELMAN:

Q Mr. Rivera, when did you start working at 293 Grant Street?

A I have been working with Mr. Diaz since 1972 when I started with him in Manhattan.

Q When did you first start working at the clothing store at 293 Grant Street?

A When? In 1973.

Q How often did you work there -- how many days a week?

A I worked six days. I was working in the company. I only had that as a part-time job.

Q How many days a week did you work part-time?

A Six days.

Q What were your usual working hours?

A In the afternoons from 4:00, 4:30 on.

Q Is there a basement of that clothing store?

A I don't think so.

Q Did you ever see a trap door going down to the basement?

A No.

Q Did you ever go in the back room of the clothing

THE CLERK: Come forward please.

Stand over here, please, face me and raise your right-hand.

H E L L E N B E R R I O S, having been duly sworn by the Clerk of the Court, took the witness and testified as follows:

THE CLERK: Will you state your name and spell it for the record, please?

THE WITNESS: Hellen, H-e-l-l-e-n, Berrios, B-e-r-r-i-o-s.

THE COURT: Do you speak English?

THE WITNESS: Yes, I do.

INTERPRETER GUNA: I will stay here, just in case.

DIRECT EXAMINATION

BY MR. MAHLER:

Q Now, Mrs. Berrios, will you tell us where you are employed please?

A Where I work?

Q Yes.

Q I work at the Chateau Lounge, 133 Irving Avenue.

Q What do you do at the Chateau Lounge?

A Barmaid.

Q How long are you working there?

A Ten months.

Q Have you ever been convicted of a crime?

A Never.

Q Were you working at the lounge in July of 1974?

A Right.

Q Do you know Manuel Piffe?

A Well, he used to come to the place. I met him there.

Q Have you had occasion to speak to him?

A Well, as a customer, usually, you know.

Q Have you spoken to him several times prior to July 1973?

A July 1973?

Q Yes, before July 1973.

A No.

Q How many times would you say you had spoken to him prior to July 1974?

A Well, a couple of times.

Q Do you know his voice?

A Yes.

Q Does he have a distinctive voice?

A Yes.

Q Would you recognize it on the telephone -- his voice?

A Yes I do.

Q In july of 1973 --

MR. MAHLER: Withdrawn.

Q Did there come a time during the summer of 1974 that you received a telephone call from Mr. Piffe?

A Right, several calls.

MR. KIMELMAN: Offer of proof, your Honor?

THE COURT: The jury may be excused.

(Jury excused at 11:30 a.m.)

THE COURT: What will this witness testify to?

MR. MAHLER: That during June, July and August of 1974 Mr. Piffe and Mr. Meranda called her on numerous occasions threatening the life out of Mr. Diaz-Martinez; that if he didn't get them out of jail or get them a lawyer they would implicate him in this case.

THE COURT: It is admissible and if true it is certainly telling testimony.

Go ahead.

Seat the jury.

(Jury entered jury box at 11:32 a.m.)

THE COURT: All right, Mr. Mahler.

BY MR. MAHLER:

Q I will repeat the question I posed to you before.

During the summer of 1974 did you receive phone calls from Mr. Piffe?

A Yes, I did.

Q Were these in July or August or both months?

A Some of them was made in July and the rest in August.

Q How many calls would you say you received from Mr. Piffe, approximately?

A About 7, 8 calls, approximately.

THE COURT: 70?

THE WITNESS: 7 or 8 calls.

Q What would he say to you on those occasions, to your best recollection?

A Well, at the beginning he was calling and telling me to ask Diaz to help him out with some money to pay the lawyer and for his needs in jail.

I know everything was quiet at the time and at the end of August he called me telling me to tell him when I see him to help him out in this case and that he would implicate him and lie in the court room if he has to if he doesn't help him because he worked for him at the

store and he should give him a hand.

Q Ever threaten his life?

A Yes.

Q What did he say?

A Whenever he got a chance he would kill him.

Q Did you speak during the summer of 1974 to Mr. Miranda?

A Miranda, yes.

Q How long do you know Mr. Miranda?

A For about three or four years.

Q Have you spoken to him on numerous occasions prior to the summer of 1974?

A Yes, at the place. He usually stop by.

Q You know his voice?

A Yes.

Q Did he call you during the summer of 1974?

A Yes.

Q Did he call you during the months of July and August?

A Right.

Q On about how many occasions did he call you during those months?

A About the same amount of calls as Fiffe did.

Q And what did he say to you?

A Well, he was telling me the same as Fiffe -- "Tell him to help me with the lawyer" unless he will involve him in this case.

Him and Fiffe had got together to involve him in the case because he don't give them a hand with some money.

MR. MAHLER: I have no further questions.

THE COURT: Mr. Kimelman?

CROSS-EXAMINATION

BY MR. KIMELMAN:

Q Now madam, could you state your name again, please?

A Hellen Berrios.

Q Barrios?

A Berrios.

Q Is it Mrs. Berrios?

A Yes, right.

Q Mrs. Berrios, how long do you know Mr. Israel Diaz-Martinez?

A About three years.

Q And do you work for him?

A No.

Q Where do you work?

A I work at the Chateau Lounge.

Q Would you consider Mr. Diaz a friend of yours?

A Well, yes.

Q And you wouldn't like to see him go to jail, would you?

A No.

MR. KIMELMAN: I have no further questions.

MR. MAHLER: No questions.

THE COURT: You may step down.

Next witness.

MR. MAHLER: I call the defendant.

THE CLERK: Stand over there, please, face me and raise your right-hand.

I S R A E L D I A Z-M A R T I N E Z, having been first duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

THE CLERK: State your name and spell it for the record, please.

THE WITNESS: Israel Diaz-Martinez, M-a-r-t-i-n-e-z.

DIRECT EXAMINATION

BY MR. MAHLER:

Q Do you speak English?

A Yes, I do.

Q You don't need an interpreter in any way?

A No sir.

Q Have you ever been convicted of a crime?

A No sir.

Q Are you from Puerto Rico?

A Yes.

Q When did you come to New York?

A I came to New York in 1958.

Q Is your family now in New York?

A Yes.

Q In what year did you first go into business for yourself -- in any business?

A That was 1966.

Q What business were you in?

A It was a restaurant, number 2 Stanwyck in Brooklyn.

Q Did you go into any other business thereafter?

A Yes.

Q What business did you go into?

A I worked as a partnership in the restaurant belonging to a friend of mine.

Q What else -- did you eventually go into other businesses?

A I went to work in a bar as a manager and I stayed in the bar for three years and after that I went

into the clothing business.

Q Now, when did you first enter the clothing business?

A 1972.

(Cont'd on next page.)

Q What was the name of the place?

A It was Boro-Wide Clothing Corporation.

Q Where are they located?

A At 12 Manhattan Avenue in Brooklyn.

Q Did there come a time when you moved to a different premises?

A Yes, sir.

Q And where did you move to? Where?

A I moved to 293 Grant Street in Brooklyn. I don't recall the date.

Q Was it in the fall of 1973? Give us approximately when you moved.

A It was about January, something like that. I am not too sure.

Q What was the nature of the business there?

THE COURT: January 1973?

THE WITNESS: Yes. When I took the place over in 1973, I rent the place, but I didn't move in until a couple of months later. That is when I first got the lease of 293 Grant Street.

What was the question?

Q Now, what was the nature of the business that you did in the store? What type of clothing business was it?

A Well, I operated like importing goods from

Hong Kong, Japan, Taiwan and local clothers, men's, women's and kids.

Q Was this a bargain basement type of store?

A Not a bargain basement. It is a wholesale basis in the low prices.

Q What would be the price of a suit in your store?

A Well, depending upon the customer. It was from 29 to $35.

Q Did you sell to stores?

A Most of the stores, that is what my business was.

Q Other than your own, in other words, did you only conduct the clothing business in that store?

A No.

Q Did you sell in other stores?

A Yes.

Q Did you have a stand at the market? Is there a market there?

A Right.

Q Where is that market?

A That is Moore Street and Humboldt. I think it is 110 Moore Street.

Q Did you do the buying for the store?

A Yes.

Q And can you tell us what your routine was during the day, the hours are on an average day.

A Yes, well, like 9 to 10 o'clock in the morning I go to the store, pick up my orders from the day before, bring it to the customers, going to see new customers, trying to buy clothes from different factories, trying to get cheap clothing, you know, to bring it to the stores.

Q How many hours a day would you say that you spend in the store or would you say you spend inside the store?

A Inside the store, well, it was quite often I get to the store and I stay there maybe two hours, three hours, four hours. It all depends if I was ready to receive merchandise from somewhere, or any order, or people that had to see me. It depends upon how many people I had in the store that I have to take care of.

Q Would you agree that you go in and out most days?

A Yes.

Q Are there any days that you stay there all day?

A No.

Q Once in a while?

A Maybe once if one of the guys is out someplace and they don't come to work.

Q Now, do you know Manuel Piffe?

A Yes.

Q How long have you known him?

A I know Manuel Fiffe since about 1970, 1971, something like that.

Q How did you first meet him? Do you remember?

A I met him at 328 Union Avenue when I used to work -- when I used to be the manager operating 328 Bar Corporation at 328 Union Avenue, Brooklyn.

Q How did you first meet him? Under what circumstances?

A He came there with a couple of other Cuban fellows. They introduced me and said, "This is Mr. Fiffe." That is where I met him.

Q And did there come a time when you got to know him on a different level?

A What was that again?

Q Well, did there come a time when you employed him?

A Yes.

Q When was that first?

A I don't know exactly dates or so.

Q Approximately.

A Yes. Well, it was like a year and a half ago.

Q Would that be 1972?

A Yes.

Q Was that in your first store?

A At No. 12 Manhattan Avenue.

Q What did he do? What was his job?

A Well, he was supposed to go open the store at 9:30 in the morning. Clean up the store. And receive any calls, any orders from any customers, have them ready for me when I came to pick them up and bring it to the people.

Q When you moved to this store did he follow you?

A Yes.

Q And by "this," I mean the store at 293 Grant Street.

A Right. That's correct.

Q What does he do at 293 Grant Street?

A Same thing. He was taking care of the store. He opened up the store in the morning. Cleaned up. Received the calls, the orders, and tells me what was going on.

Q Was he your inside man, does he stay inside the store?

A All the time.

Q What neighborhood is this in? 293 Grant Street?

A Do you mean the conditions? Well, we will call them --

Q No, I mean what part of New York? Is that

Williamsburg?

A That is Williamsburg.

Q Is this a rather poor neighborhood?

A Well, I don't know. They call it the Ghetto. That is what it is, you know.

Q Have you seen cocaine? Do you know what cocaine looks like?

A I have seen cocaine, yes.

Q And is cocaine -- is it used pretty widely in that neighborhood?

A Well, I wouldn't tell you if it is cocaine that is being used in that neighborhood because if you pass by you couldn't tell.

Q Do they use heroin in that neighborhood?

A I think it would be anything that comes to drugs or anything, you find it in those neighborhoods.

Q Do you know if Mr. Fiffe used drugs?

A At one point I do know that he used drugs.

Q When you say at one point, what do you mean by that?

A Because one time I catch him sleeping on the chair in my store.

Q Sleeping?

A Sleeping with the store wide open.

Q Are you saying sleeping?

A Sleeping with his eyes closed.

Q Now, are you married?

A Yes.

Q Do you have children?

A Yes.

Q What are the ages of the children?

A Eleven and seven.

Q Do you know Juanita Guzman?

A Yes.

Q How do you know her?

A I met Juanita Guzman through Mr. Felipe Miranda and his girlfriend.

Q When did you first hear of her?

A That was like 1971.

Q Did you begin to see her socially?

A Actually, yes, because she was living with Felipe's girlfriend in the same house. She had a furnished room in her house.

Q Did she become a girlfriend of yours from time to time?

A Yes.

Q How would you describe the relationship? Is she a girlfriend?

A No, it is a dating girl.

MR. KIMELMAN: I didn't hear that.

(Record read.)

Q Does she have an apartment that you know of?

A By the time that I met her?

Q No, presently.

A Yes.

Q That is the apartment at 239 South Fourth Street?

A Yes.

Q Have you been to that apartment upon occasion?

A Yes.

Q Have there been occasions when you helped to pay the rent there?

A Not the rental, but I have given her some money. I don't know what she would use it for, but all I do is give her some money.

Q Did she work for you from time to time?

A Yes.

Q What did she do for you in the store?

A She used to be the cashier.

Q And when did she work there?

A She worked there from 1972, 1973, 1974.

Q On the occasions that you were at 239 South Fourth Street did you ever see cocaine there?

A No, sir.

Q Now, you were present in court, were you not, when Mr. Piffe testified, is that right -- when Mr. Miranda testified, were you?

A Yes.

Q Did you hear the portion of their testimony which referred to cutting cocaine in that apartment?

A Yes.

Q Did you package cocaine?

A No, sir.

Q Did that ever happen in that apartment?

A Not that I know.

Q Do you know whether Juanita ever used drugs?

A Well, I know she smoked but she haven't done any other thing in front of me.

Q Are you talking about smoking marijuana?

A Yes.

Q Does she go with Miranda now or had she gone with Miranda?

A Oh, yes.

Q When did she go with Miranda? Do you know? I mean socially.

A Well, I can't tell you exactly that but, you know, like most of the times they go out to different places.

They go to the bar. Sometimes they don't come to work the following day.

Q Does Miranda work for you, too?

A Yes.

Q Or did he up to the time he was arrested?

A Yes.

Q When was the first time you met Miranda?

A I met Miranda in 1971, if I recall, and it was at 328 Union Avenue.

Q Under what circumstance did you meet him?

A He came to look for a job because he was under indictment for possession of a kind of drugs, I don't know exactly what it was. And he had no place to go to work. And he explained to me that he needs some money to support his family. And I told him that, you know, I was only a manager at the place but I would do something for him and that he would get a couple of days until I pick up and get something else and put him to work there. It happened that he didn't work that long because he has to make his time in jail.

Q When he came out of jail did you hear from him again?

A Yes.

Q When was this? Do you know? What time was this? What time of the year or what year?

A I don't think I would say that I know what time of the year because I don't remember that, but I would say a year ago.

Q Did you give him a job at that time?

A He was working at the factory at that time and he told me that he wants to quit because he can't take that work in the factory. He would rather work with me.

Q Did he have a drug problem with himself?

A With himself?

Q Yes.

A Well, he was involved in a case of drugs before.

Q I am talking about personally, did he use drugs?

A Not in front of me. Not in front of me. Not that I know.

Q Now, when did he start to work for you when he came out of jail?

A Four weeks after he came out of jail.

Q What time was that?

A I don't recall. I would have to go to the books and check on that?

Q Was that 1972?

A Yes, it was 1972.

Q Did he work for you right through until the time

he got arrested?

A Not exactly at the same address, though, because I had bought him a stand at Moore Street and then I moved him over to Moore Street and Fiffe stays at 293.

Q You heard him testify during the trial, did you not?

A Right.

Q Do you remember him testifying that he had a certain conversation with you wherein you told him that the store wasn't doing very well?

A Right.

Q Do you recall that conversation?

A Yes.

Q And did you tell him in substance that you couldn't continue paying him as things were?

A Right.

Q What if anything did you do in connection with Miranda after that conversation?

A Well, I bought him a stand. I bought a stand for him at 110 Moore Street.

Q Well, please tell the jury and the Court what you did with the stand. What kind of stand it was.

A The stand, you know, this is a public market like you go in there for fruit, vegetables, clothing. Everything

you wants to buy you can buy at the market. It's big. So we had a stand about I think it is 14 by 14 that we rented for $12 a week to sell pants, shirts and suits. The reason that I bought that for him was that the store wasn't enough to pay two salaries for doing nothing. So I put him on the stand in the public market so he could earn some money and don't have to be fired.

Q Well, you were going to get something from him, were you not?

A Of course, because it is my clothing. He is going to make money and I have to make money because I can't get my things for nothing.

Q Is there a basement in your store?

A Yes.

Q What is this? Is this a trapdoor basement in the back?

A If I recall now, there was a trapdoor there made after I got the store.

Q After you got the store?

A Yes.

Q This would be after the summer of 1973?

A That would be in the summer of 1973.

Q Would you describe the building to the Court, the building that the store is in at 293 Grant Street.

A Right.

Q Does it have apartments in that building?

A Yes.

Q Is the store a street level store?

A Yes.

Q How many stories are above the store?

A Two more.

Q Are there tenants above the store?

A Yes.

(Continued on next page.)

Q Did they have access to the basement?

A Yes, of course.

Q What did they keep there? Do you know? Do you know what business they have in the basement?

A Well, I understand that they have got access to the basement in case of emergency, a fuse going out, or something like that. They have to have keys.

Q Have you ever seen anybody go down there to get there or something?

A Yes. I have seen guys from upstairs, they go down there and they open the street level basement entrance. They use the basement.

Q Oh, there is a level entrance that is not --

A Right. That's in the street.

Q There is an entrance in the street?

A Yes, in the street, right.

Q You don't have to go through your store to get into the --

A No, sir.

Q (continuing) -- basement, is that right?

A No, sir.

THE COURT: That gives access to the portion of the basement under your store, the same access that you have?

THE WITNESS: Yes, sir.

THE COURT: There are no doors that bar anybody from getting into that portion of the basement that you have?

THE WITNESS: No, it is a completely wide open basement.

Q Now, do you know Mr. Vivas?

A Well, I have seen him in court now last week.

Q I mean before court.

A No.

Q You never met him?

A No.

Q Did you see Mr. Bermudez prior to court?

A Never seen him. First in court.

Q You don't know him at all?

A No, sir.

Q Prior to this trial?

A No, sir. No one of them.

Q Do you know Mr. Vivas' wife?

A No.

Q You saw her here, didn't you?

A Yes.

Q Agent Abbott, you saw him testify here?

A Right.

Q Do you know him? Did you ever see him before?

A No, sir.

Q Did you ever see any of the Agents that testified here, the Government Agents?

A Well, I see Agent Dovedko.

Q Where did you see him?

A When I got arrested.

Q Did you ever see Leva, the other Agent that took the stand?

A No. I just seen Dovedko and another fellow.

MR. MAHLER: May I just have a moment, Judge?

(Mr. Mahler examines his notes.)

Q By the way, would you describe to us the window of your store, the outside of the store?

A Yes, that's --

Q Is it a glass window?

A Yes, two glass windows, and the entrance is in the middle of the store.

Q What do you have, or what did you have if you remember back in October or November, 1973?

A What did I have in the windows?

Q Yes.

A Dummies, showing suits, pants, different things, shirts.

Q Is there any backup in the store to the window display?

A What is that?

Q Is there any backup to the window display?

A No.

Q How much of a display do you have in the window? Did it take up most of the window?

A Well, the display is at a different angle, with a split up from the window. We had a level about eight inches high down to the floor, which I call the display of the window, so that we could put the dummies over there.

Q Now, after --

MR. MAHLER: Withdrawn.

Q Did there come a time when you were arrested in this case?

A Yes.

Q About when was that?

A It was in July.

Q After you were arrested in the case, did there come a time when you received telephone calls from Miranda or Fiffe?

A Yes.

Q And when did you receive the calls from Fiffe? Do you recall?

A Not on dates. I don't have no dates. But I received calls from him. And the first call I received was very nice.

"Help me out. I won't talk. I won't say a word mentioning you, because you didn't know what was going on. But help me out."

I said, "How can I help you out now? I got no money."

Q And then what happened? Did you get another call?

A I got another call. He thanks me because I sent him $50. And I sent Felippe $50.

Q Did you get calls after that, just from Fiffe now?

A Yes.

Q When did you get these calls? Do you remember? Were they in August or July?

A I tell you, I would say it was September.

Q And what was the nature of these calls?

A The nature of the call was if I would tell the words he tell me on the phone -- Can I talk the way he spoke to me on the phone?

THE COURT: Yes, surely.

A (continuing) "Listen, motherfucker, if you don't get me out of this," in Spanish he spoken to me, "you are going to put your ass right there, because you are a bad motherfucker.

But when I come out of here, I am going to kill you."

That is what I heard from Mr. Fiffe.

THE COURT: That was in September?

THE WITNESS: In September, yes, sir.

THE COURT: Is that the first time you ever heard of any threats like that?

THE WITNESS: No, he called my wife once before to tell me that he will do something against me if I don't help him out.

Q Did you get calls from Mr. Miranda?

A Yes.

Q Did you get any calls from him in August?

A Yes. In August I got calls from Felippe, yes.

Q What did he say to you?

A The first call was to go to check his wife and kids, and try to financially help them, which I did with another $50.

Then the second call I got from him was thanks.

The third call was to tell me that he was abused of his parole, and he would take care of that because he would put me in jail. He would see me in jail.

I asked him, "Why do you say that?"

He said, "Well, I destroyed my life somehow, and you ain't going to be in the street all of the time if you don't

help me out. You are going to put yourself in the jail because I am going to testify against you."

Q Now, do you remember a conversation that Mr. Miranda testified to here in court concerning the topic of his parole?

A Right. That's correct.

Q Do you recall having any conversations with him concerning his parole?

A Yes.

Q Could you tell us approximately when those conversations took place?

A Let me tell you, that was in the summer of 1974.

Q And what did that consist of?

A Consisted that he was working for me, and his parole officer, he used to come to the store to check how he was working and how he was doing. Most of the time the parole officer don't tell that he is coming to the store. He comes straight to me.

Suddenly I see Mr. Felippe Miranda driving a Cadillac one night, and I told him, I said, Felippe, "You are working for me. You are not making a $1000 a week, you are only making $125 a week. If your parole officer will get you with that Cadillac, and gave you a question, Where did you get that car, what should I tell him?"

Then he says, "You don't have to tell him nothing. Just tell him that's not mine."

I said, "Well, you are the one on parole. I wish you luck. But don't put me in the spot if you own a Cadillac somehow, and you got it from this store."

THE COURT: You say you were paying Miranda $125 a week?

THE WITNESS: Yes.

THE COURT: How much were you paying Mr. Fiffe?

THE WITNESS: Fiffe was getting a commission.

THE COURT: How much were you paying him?

THE WITNESS: It could be 150, 180, 200. But the idea of paying Pelippe $125 was because he was on parole, and he was on the books, and that he was paying income taxes, you know, to show the Government he was correct.

MR. MAHLER: Excuse me again just a moment.

(Mr. Mahler examines his notes.)

Q Now, there were occasions, were there not, during 1973, September and October, when you were in the store with Mr. Fiffe, isn't that correct?

A Well, it could be an occasion that I have to be at the store. Every day I got to be in the store.

Q And he was there?

A Yes.

Q There were times when you were in the store with Mr. Miranda?

A Sure.

Q Did you have occasion to walk around in the store showing him different things?

A Well, I had occasion and I went to the store. I stay in the back fixing bills, making the charges for the store, packing up the clothes, or putting up plastic in it, working with the pants, and a lot of things you have to do in the store.

Q Mr. Dias-Martinez, did you ever in your life ever handle or deal with or sell cocaine or any other drug?

A No, sir.

MR. MAHLER: I have no further questions.

THE COURT: Now I may call a recess now and ask the jury to return at 1:30. The jury is excused for lunch. You may step down.

(Witness temporarily excused.)

(The jury thereupon retired from the courtroom, at 12:10 o'clock P.M.)

(The following occurred in the absence of the jury.)

THE COURT: Now I want to try to anticipate some problems.

MR. KIMELMAN: There may be a problem under Harris v. New York.

THE COURT: Yes. Are you familiar with the case?

MR. MAHLER: Yes, but I'm not familiar with the problem that you are alluding to.

THE COURT: There are times when illegally seized merchandise, or illegally seized statements may be offered on rebuttal when a witness comes in and says, "Oh, no, I had nothing to do with it. Never saw drugs of any kind. New touched drugs. I don't know what they are talking about."

MR. MAHLER: I don't think that was the statement, though.

THE COURT: Would you like to read the last answer to the last question, Mr. Simon, please?

(Record read.)

MR. KIMELMAN: Your Honor, there was also direct testimony as to the testimony of the store, and access to the basement of the store, and I believe that opens the door as to testimony as to what was in the basement of the store.

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THE COURT: Where were the drugs found?

MR. KIMELMAN: Your Honor, there was no actual cocaine found in the basement of the store.

THE COURT: No, I mean there was cocaine found on the search that I authorized.

MR. KIMELMAN: No, sir, there was paraphernalia, lactose and bags and that type of thing.

THE COURT: Where was that found.

MR. KIMELMAN: In the basement.

THE COURT: In the basement?

MR. KIMELMAN: Yes.

MR. MAHLER: I think particularly in the light of the testimony that there was open access to the basement, that wouldn't be permissible.

THE COURT: Mr. Mahler, when a defendant testifies, that never helps bar testimony.

The question is whether it comes in now in the light of the testimony.

MR. MAHLER: Well, what I don't understand quite is, Judge, how would a showing there were things in the basement rebut his testimony.

THE COURT: Well, if he were the owner of the store and if he got there enough and the fact that paraphernalia is used in the drug business was present, it might very well rebut the statement that he never

saw drugs, never had anything to do with drugs. The jury may infer that if he had possession of the store, if he were the owner, that he had possession, at least constructive possession of the paraphernalia. If he knew it was there they might reasonably infer from that that he was in the drug business.

It is not a far step, you see.

MR. MAHLER: But this is all set up by the Government --

THE COURT: Do you have any law on it.

MR. KIMELMAN: Your Honor, I don't have any law, I have read Harris, it is my understanding --

THE COURT: You can reread Walder which was a statement that was received illegally and which was used in Walder, and then Simone. That is what was troubling me when he testified.

MR. KIMELMAN: Yes, sir.

THE COURT: But I thought you missed it.

Well, that is why I gave you an extra lunch hour, I would like to hear something on it.

MR. KIMELMAN: Your Honor, I would attempt to do some research now that I would say that under Harris that there is direct testimony and --

THE COURT: Here is the difficulty I find:

There was a corporation, I assume you can

establish that he owned the corporation, for all purposes he owned the store.

MR. KIMELMAN: I think that was the direct testimony.

THE COURT: I am not sure, I don't think so.

There is enough to show that the jury can infer that he was in possession of this paraphernalia.

Now I hope I have a chance to reread the cases and try to give the citations to Mr. Mahler so he can spend his luncheon hour reading and be ready to argue it.

Anything else? Do you have any proof that Mr. Diaz-Martinez dealt in other drugs?

Are you going to bring in any other proof of dealings in drugs?

MR. KIMELMAN: Your Honor, there will be as a result of this testimony at least one rebuttal witness and --

THE COURT: But will it refer to any drugs other than cocaine.

MR. KIMELMAN: Your Honor, in view of the Court's earlier ruling as to drugs such as marijuana --

THE COURT: This testimony may very well put the case in a different framework.

I want to know what you want to do so I can

prepare and do what I believe necessary to prepare myself.

MR. KIMELMAN: I have to consider it, I believe there are witnesses that can be produced who may testify that this defendant also dealt in marijuana during the term of the conspiracy, and whether the Government will call them --

THE COURT: I will think about that in light of his last statement.

MR. KIMELMAN: I also may --

THE COURT: When a witness takes the stand and testifies, he runs the risk of bringing into the case evidence that would otherwise be inadmissible.

MR. KIMELMAN: Might I say to the Court at this time in the interest of saving time later this afternoo that the one rebuttal witness that the Government knows of now will introduce a taped conversation between that witness and Juanita Guzman, which is a conversation in reference of this cocaine conspiracy and where this defendant's name is mentioned by --

THE COURT: When, when did that occur.

MR. KIMELMAN: January of 1974.

MR. MAHLER: And because his name is mentioned, this is going to be rebuttal to his testimony?

MR. KIMELMAN: Your Honor, I believe that this

testimony would have been perfectly proper on the direct case as a statement by Ms. Guzman, who is a co-conspirator, and this conversation was in furtherance of this conspiracy and is therefore also proper on rebuttal, but along those lines I would anticipate that there would be a necessity for a hearing.

THE COURT: Is there anything else that you can think of that might involve some research.

MR. KIMELMAN: No, sir, but as I say I believe we are attempting to get ahold of the witness right now.

I understand that -- well, if I may, it is an undercover police officer, a City police officer --

THE COURT: That is quite obvious he is undercover something, whether Federal or State.

MR. KIMELMAN: Yes, sir, and the 3500 material was excised by the Court and when this witness takes the stand it will then be turned over to counsel for the defense, but there is a tape that is between this undercover officer and Juanita Guzman, and the defendant's name is mentioned in the tape and I anticipate that we would have to have a hearing to authenticate the tape and the transcript that goes along with it.

THE COURT: All right.

Shall we try to be in Court at -- well, one full

THE COURT: I certainly think that did it.

McCormick has an interesting discussion on it in the handbook series, page 418, discussing Harris.

As a matter of fact, McCormick observes that Harris broadens the Walder exception by eliminating the requirement that the defendant open up a collateral matter.

He notes that Harris' testimony amounted to little more than a denial of guilt of the specific offenses charged by denying participation and transaction or that the substance sold was that charged.

Apparently, all that will now be required is that the defendant's testimony and that the otherwise inadmissible evidence be relevant to his credibility.

MR. MAHLER: But what is the specific rebuttal to be? It has to be in response to his last answer. It can't be just any rebuttal.

THE COURT: That's right.

MR. MAHLER: The Government talked about tapes, allegedly, of Juanita Guzman mentioning the defendant's name.

THE COURT: Let's leave that aside.

MR. MAHLER: I think he has to tell us what type of rebuttal evidence he has which goes to rebutting the specific nature --

3 THE COURT: We are talking about the illegal seizure at the moment.

MR. MAHLER: All right -- about the illegal seizure.

This is a store, according to the testimony, with people having access to the store. It is a store open to business. In fact, there is an entrance from the outside where you don't even have to go into the store to go down to the basement. Even the agents testified to that.

Mr. Diaz has ever testified that the tenants above can go down into the store.

I don't think there is any refutation of the trapdoor or cellar.

I don't think for the purpose of rebuttal they can come in to show that he possessed the contraband or seized articles in the basement.

THE COURT: Supposing the seized articles were in his home or on his person?

MR. MAHLER: That was discussed in Walder.

THE COURT: Would that then be clearer to you?

MR. MAHLER: Yes.

THE COURT: So, the only issue is whether this defendant possessed these items. That's the only difference.

4 MR. MAHLER: I think the issue is whether or not the rebuttal goes to the answer he is going to rebut.

THE COURT: You concede if he had these articles on him that it would be admissible to rebut what he said -- that he never dealt in narcotics? You concede that?

MR. MAHLER: Yes, and I think the home differs from this situation here.

THE COURT: He had it in his pocket, let's say. Would that be admissible?

MR. MAHLER: I would think so, yes.

THE COURT: So, we are talking about proof that he was in possession of these items. Possession is a fact issue. Of course, you can bring all this out and you can argue it that this was a store and others had access to it.

The Government, on the other hand, can argue that this basement was under his store; that he had a trapdoor directly to it; that others in the case testified they went down to the basement to conduct cocaine transactions or at least one transaction.

The jury will decide whether he was in possession, whether it was in fact his items.

I find that under Harris the evidence that I

originally held was illegally seized may be used in cross-examination or in rebuttal.

Now, the tapes.

MR. KIMELMAN: Yes, sir.

THE COURT: How are they admissible?

MR. KIMELMAN: The tapes, your Honor, is a conversation between an unindicated co-conspirator and an undercover police officer and this conversation mentions Mr. Fiffe, for one, his name comes into it, Mr. Diaz comes into it.

There is a conversation relating to the purchase of cocaine. There conversation is during the course of the conspiracy and certainly, in furtherance of the conspiracy.

THE COURT: Why is it admissible at this time in rebuttal?

MR. KIMELMAN: Your Honor, I believe it was admissible on the Government's direct case and in view of the defendant's last statement that he did not deal in any drugs and in view of his statement regarding Juanita --

THE COURT: Mrs., whatever her name is, Juanita Guzman, her statement is not an admission by the defendant.

MR. KIMELMAN: No, it is not.

THE COURT: The only way to get it in is on the theory of agency.

MR. KIMELMAN: Yes, sir.

When it comes time for your Honor to hear the tape --

THE COURT: Why wasn't it offered before?

MR. KIMELMAN: Your Honor, the Government felt that this was evidence that might better be used in rebuttal after this defendant denied knowledge dealing with Juanita Guzman and knowing of her involvement in narcotics.

MR. MAHLER: I don't follow how her statement could be used under these cases like Harris and Walder.

THE COURT: It has nothing to do with that principle.

I can see it only as a statement by a co-conspirator.

MR. KIMELMAN: Yes, sir. That's what I am offering it as -- as exception to the hearsay rule -- as a statement by the co-conspirator in furtherance of the conspiracy.

THE COURT: But how can Guzman's statement be used to rebut his statement that he never dealt in narcotics?

MR. KIMELMAN: Because Guzman's statement says

he dealt in narcotics.

THE COURT: No. That's the wrong argument, definitely the wrong argument.

MR. KIMELMAN: He stated on direct examination that he never saw narcotics at 239 South Fourth Street and had no knowledge of her dealing in narcotics and never saw her with narcotics --

THE COURT: Her statement to an agent does not meet that evidence.

If she was here and said he saw her "in my apartment," that's one thing but her saying it to the agent is entirely different.

MR. KIMELMAN: No different than the other testimony as to what Mr. Blanco said.

THE COURT: That was brought on direct. I don't know if I should allow you to offer it on redirect if it could have been brought out on direct and there was no reason not to do so.

The mere fact that he testified that he had nothing to do with drugs is not the basis for bringing it on re-direct.

You are saying it should have been brought out on direct because it was a statement made by a co-conspirator during the course of the conspiracy.

MR. KIMELMAN: I say it would have been permissi

under direct.

THE COURT: Not only permissible. That's where it belonged.

I don't know about that. You'll have to hold that. I don't like to exclude testimony that is otherwise admissible.

MR. KIMELMAN: If we come to a point where the tape made be played and the Court will make a further determination --

THE COURT: No. We'll go into cross-examination.

MR. KIMELMAN: I mean, at a later time.

THE COURT: All right.

MR. MAHLER: One other point.

I don't think in the course of Mr. Diaz' testimony that there is any denial by him that transactions might have taken place in the store or that they might have been going on in the basement. That's not what he testified to.

THE COURT: I remember it very well.

As a matter of fact, I can almost hear your argument on that.

You are going to concede that of course, it was taking place and all this without his knowledge; that he was seldom in the store --

MR. MAHLER: No -- how that evidence rebuts his

(Jury entered the jury box at 1:35 p.m.)

I S R A E L D I A Z - M A R T I N E Z, having been previously sworn the Clerk of the Court resumed the witness stand and testified further as follows:

THE COURT: You may proceed, Mr. Kimelman.

CROSS-EXAMINATION

BY MR. KIMELMAN:

Q Mr. Diaz, are you the owner of 293 Grant Street?

A Yes sir -- well, not the owner of 293, but 293 Clothing Corporation, what you call 239, not the building, just the premises.

Q You are the owner of the premises?

A That's right.

Q Previous to owning the clothing store you had a store, clothing store, called Boro-Wide Clothing Store at 12 Manhattan Avenue?

A Yes.

Q Did you own any other business establishments?

A The only other is the stand that I had at the Public Market, 110 Morris Street.

Q Did you ever have any financial interests in some bars?

A N o sir.

Q Did you ever hear of a bar named Jose's Bar?

A Yes sir.

Q Do you own any financial interest in that bar?

A No sir.

Q Did you ever own any financial interest in it?

A No.

Q Ever own stock in that corporation?

A No sir.

Q Ever receive profit from Jose's Bar?

A Perfectly, that is correct.

Q You received profits?

A No. I get paid to do some work.

Q What kind of work?

A As a manager.

Q Who owns Jose's Bar?

A Jose's Bar is owned by Jose Vega.

Q Is he also a partner of yours in the clothing store?

A That is correct.

Q You just worked for Mr. Vega at the bar?

A Yes. I used to work for Mr. Vega at the bar.

Q You never had any financial interst in the bar?

A No sir.

Q At any time?

A At any time.

Q That bar is at 184 Broadway; is that correct?

A Yes sir, that is correct.

Q And do you own any other business establishments or have any other financial interests in other businesses?

A Before that?

A No, right now.

A No sir.

Q How about from October of 1973 until May of 1974?

Did you own anything other than the clothing store at 293 Grant Street?

A No sir.

Q You had no financial interest in any other businesses?

A No sir.

Q Now, from a period of October of 1973 through May of 1974 who were the employees of the clothing store, full time and part time?

A There was Manuel Fiffe, Pelipe Miranda, Francisco Rivera, Sherman Bollen and Martin Hope.

Q And Juanita Goseman?

A Israel Diaz, myself.

Q And Juanita Goseman also?

A Yes sir.

Q What did Mr. Fiffe do in the store?

A He was in charge to open the store every day in the morning, clean up the place and stay there receiving orders, whatever he could sell and pack up deliveries to other stores.

Q Would you say Mr. Fiffe was the manager of the store?

A No, not the manager but the superintendent of everything.

Q Did you entrust Mr. Fiffe with the days receipts every day?

A Yes.

Mr. Fiffe was my confidant.

Q Would he bring you the receipt every day?

A He didn't bring the receipts. They stay in the store and I check them every day.

Q Was Mr. Fiffe authorized to give credit to different customers?

A Yes, yes.

Q You say you don't know --

MR. KIMELMAN: Strike that.

Q You went to the store every day?

A Yes sir.

Q Part of each day?

A Well, it could be in the morning, 2 O'clock, 5 O'clock, 11 O'clock at night.

Q Just to sort of check on how things were going?

A No, not exactly though.

Q Why would you go?

A To bring merchandise, to pack up merchandise, and receive merchandise, and talk to a few customers, make my telephone calls -- a lot of things.

The accountant came in. I have to take care and be there with him.

Q You would meet certain customers and make sure they were satisfied with their clothes and help them out if they had any problems?

A Right.

Q Did you have a pretty good idea of who the steady customers were in the store?

A Of course.

Q And you kept a pretty tight rein on who was buying what and what kind of credit Mr. Fiffe was giving out?

A Yes.

Q And you were familiar with the books of the clothing store?

A It's my store. I have to do that otherwise I wouldn't be the boss.

Q Of course.

A Right.

Q You say you never met Mr. Eduardo Bermudez?

A No sir.

Q Did you know he was a steady customer of your store?

A No.

Q Did you know that Mr. Fiffe had extended him credit on certain occasions?

A It's very possible because he right on the books.

Q But you don't recall?

A I don't know the names or the people.

If he says "I took a chance with this fellow. He gave me this much until -- and he'll pay in a couple of payments, three or four or whatever," it has to be done.

Q It didn't ring a bell to you when you realized that you would be on trial with MR. Bermudez, that he was a customer of your store?

A If he was a customer? I see so many on the books -- most of the people work on the basis of credit. I allow it from one week to another -- give to the store or the people I have working for me.

Q And you ever recall seeing Mr. Bermudez' name written in your books -- his name and address?

A I don't recall that.

Q And you don't recall, obviously, ever seeing his phone number written anywhere in your books?

A No sir.

Q So, the first time that you heard the name Eduardo Bermudez and met this gentleman is when you came here for the trial; is that correct?

A That is correct.

Q Now, Mr. Miranda, he also worked in the store; is that correct?

A That is correct.

Q How long has he been with you?

A That was about four weeks after he came out from jail.

Q You knew he was in jail?

A Sure I knew he was in jail.

Q You knew what he was in jail for?

A Yes.

Q But you were willing to give him a chance, right?

A Yes.

Q You knew he was on parole?

A Yes.

Q You knew that if he didn't follow the rules of his parole he would have to go back and serve his sentence?

A Well, whatever could happen to him -- I just hired him as a worker.

Q But you knew that the parole officer came to the store?

A Yes sir.

Q And you put him on the books so the parole officer would see he had a steady job?

A Not just for the parole officer but to put him on the books so he was doing correct things.

Q You said you were concerned because one time you saw him driving a Cadillac and you were afraid --

A I wasn't afraid for anything but I told him it wouldn't be good for him.

Q You knew if he got in trouble he would have to go back to prison?

A That's the rules of New York. If you don't do the right thing under the law you go back to jail.

Q And certainly, if somebody ever told the parole board Mr. Miranda was selling cocaine he would go back to jail --

MR. MAHLER: I object. It is not within his knowledge.

A I don't know that.

THE COURT: Objection overruled. He says he doesn't know that.

Q What did Juanita Guzman do in the store?

A She was a cashier.

Q How long have you known her?

A Since 1971.

Q And how did you meet Juanita Guzman?

A Through Felipe's girl friend at number 20 Dartworth Street. She used to have a furnished room rented from Felipe's girl friend.

Q When did she start working for you?

A She started to work for me before Felipe went to jail.

Q Approximately when was that?

A I would say 1971, I don't know for sure what date.

Q And how many hours a week did she work for you?

A From 10:00 to 6:00.

Q Every day?

A Not every day; four days, five days.

Q How much did you pay her for this?

A $85.

Q And you told us this morning that you sometimes gave her extra money?

A That is correct.

Q You say that was a gift?

A A gift because I used to go out with her and if you go out with a girl you know it costs money.

Q Yes, I know.

How long did you go out with her?

A How many times?

Q How many times over what period?

A A few times.

Q Would you say over three months time?

A Not steady. When I got the chance. She has other people she goes out with as I understand.

Q She went out with you and other people also?

A She is the type to go like that.

Q She lived at 239 South Fourth Street?

A Yes.

Q When did she start living there?

A I don't remember the date. I would say about two years.

Q Two years?

A Yes.

Q And she was living there in 1973?

A Correct.

Q And she was living there in 1974 also?

A Correct.

Q Do you know who owns the building at 239 South Fourth Street?

A No, I don't.

Q Do you know if Jose Vega owns the building or has an interest in it?

A I have never had an idea if he owns the building and I know him well.

Q He never told you he had an interest in that building?

A Not that I understood or anything because I don't know who she pays rent to or who owns the building.

Q Do you know if she paid rent at all?

A Well, who lives for free in New York?

Q Did you ever help her out with the rent payments?

A I don't say I helped her out on the basis of

paying for rent but I did give her money. Whatever she do with it I don't know. She lives by herself.

Q By herself?

A Right.

Q And you told us this morning that you had been there; is that right?

A Yes.

(Cont'd on next page.)

Q On how many occasions would you say that you have been to Juanita's apartment?

A I don't know how many times exactly.

Q Would you say more than ten times?

A I would, yes.

Q More than 30 times?

A Yes, I would say more than that, yes.

Q So, it is a substantial amount of times?

A A substantial amount of times, right, on different dates.

Q Different dates?

A Right.

Q Would you consider Juanita a friend of yours?

A I believe so.

Q And you are still friends with her today?

A Sure.

Q And if she asked you for money today would you give her money?

MR. MAHLER: Objection.

THE COURT: Overruled. I will allow it.

A If she asked me for money today? If I had it I would give it.

Q Now, did you ever call Juanita?

A If I ever call her?

Q Did you ever call her at the apartment?

A Sure.

Q Do you recall offhand her telephone number?

A No. I don't have it on myself, with me.

Q Is the number 387-7180?

A That is correct.

Q That is the number.

What is your phone number, Mr. Diaz?

A My home telephone number?

Q Yes.

A 443-3866.

Q And did you ever make arrangements with the telephone company to pay for Juanita's telephone?

A That is correct.

Q And when did you first do that?

A I don't remember when I did that but I did that because she had no credit so I allowed her to use my -- what you call -- my credit so she can have the telephone installed.

Q Isn't it a fact that you told the telephone company --

MR. KIMELMAN: Strike that question.

Q Isn't it a fact that you used Boro-Wide Clothing Store as the credit source?

A As she was working at the store and they told

me why should I use somebody else's name because mine was good and somebody, they put "J" instead of "I".

I tried to register under my name.

Q But it was registered under Juanita Diaz?

A "J.Diaz."

Q Is her name Juana?

A Yes.

Q Did you pay for the bills every month?

A I didn't pay it. I deduct from her salary and mail it and pay it.

Q But the bills were sent to your clothing store; is that correct?

A I'm not sure of that.

Q You said you deducted it from her pay, isn't that right?

A Well, if she going to get $85 a week and she got the bill, $15, so I took $15 and mailed the bill.

Q So you took care of her phone bill?

A Once in a while, not all the time.

Q You don't recall where the bill was sent --

A I don't remember if it was sent to 239 or Manhattan Avenue.

Q Do you ever recall any conversation you had with the telephone company about the payment of these bills?

A No.

Q Ever recall any service representative from the Telephone Company calling you at home about these bills?

A Yes.

Q And when did this conversation occur?

A This happens by the end of, I think, July -- August or September somewhere.

Q What was that conversation about?

A That I was responsible for that phone and they had a bill and it wasn't paid and if I would pay for it. So I didn't get in touch and I didn't pay it yet.

Q They called you at your home on Jefferson Street?

A Yes.

Q Did you ever help Juanita set up the apartment -- get her some furniture?

A No, sir.

Q And you of course never saw any cocaine in Juanita's apartment?

A No, sir.

Q Did you ever ask Juanita if she ever dealt in cocaine?

A No, sir.

Q Do you know if Juanita dealt in cocaine?

A Not that I know of.

Q Do you know if Mr. Miranda dealt in cocaine?

A Not that I know of.

Q Do you know if Mr. Fiffe dealt in cocaine?

A As I told you once before -- told my lawyer Steve Mahler --

THE COURT: Strike out, "told my lawyer Steve Mahler."

THE WITNESS: Well, I told the Grand Jury and everybody in court --

THE COURT: Strike it out and everybody disregard it.

THE WITNESS: What do you want me to tell them, Judge?

THE COURT: Just answer the question.

Q Do you know if Mr. Fiffe dealt in cocaine -- yes or no?

A Not that I know of.

Q Now, where do you live, Mr. Diaz?

A 54 Jefferson Street, Brooklyn.

Q How long have you been there?

A I been living there since 1970 -- 1970.

Q You still live there?

A Right.

Q What kind of place is that?

A What do you mean, "What kind of place"?

Q A private house, apartment --

A Two-family house.

Q One-family house?

A Two families.

Q And who else lives there?

A Mr. and Mrs. Mercado.

Q How long has Mr. Mercado lived there?

A Since 1970.

Q Does anybody else live there other than Mr. Mercado and your family?

A No.

Q Does Mr. Mercado have a family?

A Yes.

Q Who lives with Mr. Mercado at his address?

A His wife and the two daughters.

Q His wife and two daughters?

A Yes.

Q Anybody else stay there with him?

A That I can't tell.

Q Not that you know?

A If somebody stays overnight -- but not steady.

Q Not steady?

A No.

Q Who lives with you?

A My wife and the two kids.

Q Anybody else live with you?

A No.

Q Did you ever hear of the name Angel Ortiz?

A If I ever hear, what?

Q Have you ever heard the name Angel Ortiz?

A Yes, sir.

Q Who is Angel Ortiz?

A A friend of Fiffe's.

He is in Puerto Rico now.

Q Does Angel Ortiz live at 54 Jefferson Street?

A No, sir.

Q And he never lived there?

A No, sir.

THE COURT: You say he is in Puerto Rico now?

THE WITNESS: Yes.

THE COURT: When did he go to Puerto Rico?

THE WITNESS: If he hasn't come back yet he left to Puerto Rico about, I would say, a year ago.

Q Is Angel Ortiz a friend of yours?

A No. He's a friend of Mr. Fiffe's.

Q A friend of Mr. Fiffe's -- just a friend of

Mr. Fiffe's?

A Yes.

Q In October through May -- October 1973 through May 1974, do you know if Mr. Fiffe drove any automobiles? Did you ever see him driving?

A If I see Fiffe driving an automobile during, what time?

Q October 1973 and May 1974.

A It is very possible, yes.

Q Did you ever see him?

A Yes.

Q What kind of car was he driving?

A He was driving a '69 Ford.

Q Ever see him driving a Mercury?

A Yes.

Q Do you recall what year Mercury that was?

A No.

Q Was it an older car?

A An old car, yes.

Q Possibly, a '65?

A Possibly, yes.

Q And do you know what kind of plates were on the car -- New York plates or out-of-state plates -- on either of those two cars?

A I know what it had when he first got the car, Ohio State.

Q Ohio plates?

A Yes.

Q Did you ever help Mr. Fiffe get New York plates for that car?

A Angel Ortiz did that.

Q Angel Ortiz did that?

A Yes.

Q How do you know that?

A Because Angel Ortiz, I sold my car, '69 Ford to Angel Ortiz.

Then, Fiffe has no license or identification; can't get insurance and he told me to go with Angel Ortiz to John Cacciolla, the broker agent to get his plates transfered from Ohio State plates to New York State plates.

Q Angel Ortiz told you this?

A Not what Angel Ortiz told me.

He told me to get Fiffe's plates under Angel Ortiz' name.

Q Did you go with Mr. Fiffe?

A No. I sent Angel Ortiz with him to get the plates.

Q Did he get those plates?

A I don't know but the bills came to my house.

Q Why is that?

A Because Fiffe has no residence by the time he has the car and Ortiz was leaving for Puerto Rico so I told him, "Let me receive it at my house," and that's what it registered for.

Q So, the car with the Ohio plates was now registered to Angel Ortiz at 54 Jefferson Street, Brooklyn, New York?

A As I understand, yes.

Q And that's the same case with the 1965 Mercury? That went to Angel Ortiz at 54 Jefferson Street and you received the bills?

A Right.

Q And you are doing this to help Fiffe out?

A What?

Q You were doing this as a favor to Fiffe?

A At what point?

Q Well, as to allow the mail to be sent to you?

A Right, that is correct -- not for Fiffe but Angel Ortiz.

Q But he was a friend of Fiffe, not yourself, wasn't he?

A No. He introduced me to Angel Ortiz. That's

why I sold him my 1969 Ford.

Q He apparently sold it to Mr. Fiffe, I take it.

A Not that I know.

Q He just drove the car -- Fiffe?

A Fiffe had a different car than the '69 Ford and he registered it under Angel Ortiz' name.

Q That was the Mercury?

A Right.

Q But sometimes you would see Fiffe driving the '59 Ford also, isn't that right?

A Could be. Possibly. I don't remember.

Q You don't remember.

A No.

Q But in any event, you are doing a favor for somebody, Angel and Fiffe, right?

A Angel or Fiffe.

Q You did a favor for Juanita -- gave her money?

A I didn't give her a favor. I paid for going out with her.

Q You gave her gifts?

A No. I paid her. She don't go out for nothing, you know.

(Continued on next page.)

Q I see.

So that the money that you gave to Juanita was--

A That was pay.

Q And that is the same with the telephone, you were paying her for something; is that right?

A I didn't pay, she paid.

MR. MAHLER: Your Honor, I object, this is irrelevant.

THE COURT: Would you let me hear that question and answer?

(Reporter repeated the question and answer.)

THE COURT: Overruled, I will let it stand.

BY MR. KIMELMAN:

Q Now, you say the clothing store -- does that have a back room?

A The clothing store, does it have a back room?

Q Yes, sir.

A It has two rooms.

Q It has two rooms?

A Yes.

Q A front room where the clothes are -- where you sell the clothes?

A Right.

Q And some type of back room?

A It's another room in there, another room.

Q There is another room?

A Yes.

Q How is it separated from the front and back?

A The store is divided between -- about, about twenty-five feet which is the front, which is a showroom, there is another room for changing clothes, and that empty room way to the back.

Q And did you use any of those rooms for your office?

A If I used the room for the office, I had my desk.

Q In the back?

A In the back.

Q And was there some type of trap door by this desk?

A It is, yes.

Q Is there a trap door?

A Yes.

Q Where does that trap door lead?

A To the basement.

Q And have you ever been down in that basement?

A What?

Q Have you ever been inside the basement?

A Yes.

Q What is down there?

A A boiler.

Q A boiler?

A Yes.

Q Is there anything else down there?

A Could be a lot of things, it's a lot of junk downstairs.

Q For example?

A Wood, old wood, a lot of rooms divided.

Q Do you store any clothing down there?

A If I store clothing down there, no.

THE COURT: Who takes care of the boiler of that building?

THE WITNESS: What?

THE COURT: Who takes care of the boiler in that room?

THE WITNESS: I do.

BY MR. KIMELMAN:

Q And what else do you store down there, besides wood?

A Nothing.

Q Would it be fair to say it is not used for very much?

A No.

Q And on how many occasions would you say, since you owned the store, you have been down in the basement?

A Three times.

Q Three times?

A Yes.

Q And you told us this morning that the trap door was built after you got the store; is that right?

A That is correct.

Q Would you ever have drinks with customers in the back room?

A Almost every day.

Q Do you talk, as you said before, you talk to the customers, you socialize with them?

A That is correct, that is correct.

Q Now, that was the back room of the store?

A Yes, sir.

Q In one of the back rooms?

A Right.

Q Now, is there another entrance to this basement?

A Yes, sir.

Q Where is that?

A From the street.

Q From the street?

A Yes, yes, sir, yes.

Q And what type of entrance, is it one of these grates that are level with the street?

A A regular entrance into the basement.

Q How does one get into the basement, are there stairs or is there one of these elevators?

A Stairs.

Q Stairs?

A Yes.

Q And is this entrance on the street locked?

A Yes, sir.

Q It has a lock on it?

A Yes.

Q And do you have a key for that lock?

A Yes.

Q And I take it -- you told us this morning that other people have keys --

A Yes.

Q -- (continuing) -- also?

A Yes.

Q And can you tell us why they have keys?

A Well, the tenants upstairs have keys.

Q And who gave them those keys?

A The landlord.

Q Right, and could those tenants go in from the street into the basement and then up into your store --

A Well --

Q (continuing) -- through that trap door?

A Yes, they could go.

Q And you know the people who live upstairs, don't you?

A No, I don't.

Q You don't know them at all?

A I seen them lots of times.

Q You never talked to them?

A Oh, yes, spoke to them a few words, hello, how are you, anything you need in an emergency call me up.

Q They seem to be law-abiding citizens to you?

A What?

Q Do they seem to you to be law-abiding citizens, to you?

A It seems to me they pay their own rent, they don't bother with me, I don't bother with them.

Q You were never bothered, then, they would go into your basement and go up and steal something?

A Yes, yes.

Q What did you do about that?

A What did I do about it?

Q Did you put a lock?

A Can I show you the search warrant of what happened at the store?

THE COURT: Mr. Diaz, would you please answer the question and nothing else.

THE WITNESS: All right.

BY MR. KIMELMAN:

Q Did you put a lock on the trap door?

A No, I nailed it.

Q You nailed it?

A Yes.

Q And then to get into the trap door, how would you open it?

A There's no way to open.

Q There is no way to open?

A No.

Q You told us you went down three times, how did you go --

A I didn't go downstairs through that trap door.

Q How did you get in there?

A I went in through the front entrance, that is the way I get into the basement.

Q And you never went through the trap door?

A No.

Q And this trap door was built after you took over the store?

A That is correct.

THE COURT: When you say it was built, are you saying you built it?

THE WITNESS: No, I find out it was made from one of my employees.

One time I walked into the basement to put a new boiler and I see a guy working downstairs and he told me there was a door, which I called the people, I called Fiffe, I called Felipe, they didn't know.

THE COURT: You are saying that in the winter-time when there is snow on the ground and you have to go down to the boiler in the basement, you don't use the trap door, you go outside?

THE WITNESS: When -- every time I have to go into the basement, I have to go through the outside door.

THE COURT: When there is snow on the ground?

THE WITNESS: Even if snow on the ground.

THE COURT: You never used that trap door?

THE WITNESS: I never know it was there until I went to the basement one day.

(continued on next page)

Q And whom do you say built that trap door?

A I don't say I see anybody built it --

Q I understand.

A (continuing) I said that Felipe and Fiffe --

Q You said you found out one of your employees did?

A No, no, I didn't say that I find out one of my employees, I found one of the tenants upstairs coming out of the basement --

Q And to this day you don't know who built that trap door; is that right?

A No.

Q And every time you were in the store that trap door was always nailed down; is that right?

A I didn't know it was there, when I find out I nailed it.

Q When is the first time that you found out?

A The first time that I find out was the day before I had a search in the store by the police department.

Q What day was that; do you recall?

A No, I can't.

Q Would it have been in March of this year?

A I don't remember what date, I know the store was searched by the police department --

Q And the day before the store was searched, that is when you realized there was a trap door?

A That is correct.

Q And that is the day you nailed it?

A That is the day that I called up Felipe to find out who built it.

Q What did you say, what did Felipe say when you told him there was a trap door?

A He says it was there.

Q And did you ask Mr. Miranda if he knew anything about this trap door?

A Yes.

Q What did he say?

A He says he don't know.

Q And did you ask Juanita Guzman if she knew anything about the trap door?

A No, I didn't ask her.

Q You didn't ask her?

A No.

Q Did you ask any other employees in the store?

A Yes.

Q Whether they knew how this trap door got there?

A No.

Q And when did you nail the trap door?

A The same day, the same day that I find out that Fiffe was living at the store because he was thrown out of his apartment.

Q The same day that you found out that Fiffe was living at the store you nailed it, and was that before or after the search warrant?

A No, I -- I got that store, I find out the day when they searched the store, they says it was a trap door, now when I see the guy coming out of the basement that day, I told Fiffe who was the guy, the guy was from upstairs, one of the tenants.

(continued on next page)

Q Mr. Diaz, did you nail the door before the search warrant was executed or after the search warrant was executed?

A After.

Q After?

A Yes.

Q And the first time that you found out that there was a trap door was the day before the search warrant; is that right?

A That is correct.

Q And you said there was a search throughout your store?

A Yes.

Q But you don't recall when that was?

A No.

Q And if I told you there was a search of the store on March 26, 1974, does that help you remember?

A Could be possible.

Q It was around that time; is that right?

A What?

Q It was around that time?

A I would say yes.

Q And how did you find out that there was a search being done of the store?

MR. MAHLER: I object to this line.

THE COURT: Overruled.

A How did I find out there was a search of this store?

Q Yes.

A I was at home about 11:30, 12:00 o'clock, I would say, I received a call from Mr. Fiffe telling me there was -- of an army of agents searching the store.

Q What did you say to Mr. Fiffe?

A To watch them because it was a lot of guys, they could have stealed a lot of the clothes.

Q And did you use any other terms to describe the agents?

A No, sir.

Q And did Mr. Fiffe tell you why they were searching the store?

A No, he told me there was a search --

Q In the store --

A (Continuing) I said,"Just watch them, there's a lot of guys."

Q Did he tell you from what agency these men were from?

A Just said Police Department.

Q He didn't tell you they were from the Drug

Enforcement Administration?

A No.

Q And were you concerned that this army of agents was searching your store?

A If I was concerned?

Q Were you concerned?

A In what case, under what terms?

Q Were you upset that they were searching your store?

A Didn't bother me.

Q You didn't have anything to hide?

A Well, that's not my idea to have the store over there.

Q And you certainly didn't have any drugs in the store; is that right?

A Never.

Q And you certainly didn't have any implements that could be used in a drug business; is that right?

A No, sir.

Q And you wouldn't have anything like lactose, for example, in the store?

A No, sir.

Q And would there be any reason for you to keep something like lactose in your clothing store?

A No, sir.

Q And would you have any plastic bags, little baggies?

A No, sir.

Q In the store?

A It could be that there be bags over there somewhere, but as I says, I don't know because I have plastic bags to put the clothes, to put shirts, to put pants, everything, all kinds of plastics.

Q Small bags like you wrap a sandwich in?

A Not that I recall.

Q You wouldn't, you couldn't keep those in the store, would you?

A What?

Q You normally wouldn't keep those in the store, would you?

A No.

Q And you wouldn't keep something like a strainer that you would use in a kitchen in the store, would you?

A There's no kitchen in the store.

Q So, you wouldn't have any need for some type of strainer you could strain things through?

A No.

Q Now, did you eventually go down to the clothing

store that day?

A If I went to the clothing store that day?

Q After the agents had searched?

A Yes.

Q Did you have a conversation with Mr. Fiffe?

A Yes.

Q And what did Mr. Fiffe say to you about the search?

A He showed me a copy of the search warrant.

Q And did he tell you what the agents found?

A He didn't tell me, I read the paper what they found in the store.

Q Sir, did he show you a copy of the search warrant and on that copy it showed what they had taken?

A Right.

Q And what did Mr. Fiffe say about the search?

A What did he say about the search? He said just they walked in and pushed in and that's it.

Q Was Mr. Fiffe upset?

A If he was upset, he was like shaken and he was afraid.

Q What did you say to Mr. Fiffe after you read the search warrant?

A What did they found out, who does that belong to.

Q And you had no idea?

A I don't have no idea that it was there.

Q And you were completely surprised that they found this in the store?

A Yes.

Q And do you know where they found these items?

A No.

Q Did Mr. Fiffe tell you where they found these items?

A No.

Q Didn't Mr. Fiffe tell you that they found these itmes in the basement of the store?

A No, sir, he told me they searched the whole store, he didn't tell me where they found it.

Q And in the course of your conversation with Mr. Fiffe, did you tell Mr. Fiffe, "It's a good thing I moved the marijuana out of the basement"?

A What?

Q Did you tell Mr. Fiffe, "It's a good thing I just moved the marijuana out of the basement."

A No.

Q You never said that?

A No.

Q Did you have any discussion with Mr. Fiffe

about marijuana that was kept in the basement of the store?

A No, sir.

Q You are sure?

A Yes, I am sure.

Q Did you ever deal in marijuana, Mr. Diaz?

A I smoke marijuana.

Q Did you ever deal in large quantities of marijuana?

A No.

Q You never dealt in pounds and pounds of marijuana?

A No.

Q And you never kept any marijuana in the basement of the store?

A No, sir.

Q I show you what has been marked as Government's Exhibit 8 for identification, and I ask you is this the warrant that Mr. Fiffe showed you?

A Yes.

Q Do you recognize that?

A Yes, my handwriting is over here (indicating).

Q Is that your handwriting?

A Yes.

MR. KIMELMAN: Your Honor, I would offer this

in evidence except for Mr. Diaz's handwriting.

THE COURT: May I see the handwriting?

MR. KIMELMAN: Yes, sir.

(Document handed to Court.)

MR. KIMELMAN: If I may, I understood that Mr. Mahler had written something on that also.

Did you ever write on it?

MR. MAHLER: May I see it, your Honor?

THE COURT: any objection to the warrant being offered?

MR. MAHLER: Yes -- no, but I object to any part of it being excluded.

THE COURT: All these self-serving declarations are excluded.

MR. KIMELMAN: Your Honor, may we have a translation of what is written on there, I have no idea what it says.

MR. MAHLER: I object, I object to the offer.

THE COURT: Objection overruled, the warrant, front, and on the back of the return all above the line, "For United States Magistrate's signature" is admitted in Government's Exhibit 8.

THE CLERK: So admitted in evidence, Government Exhibit 8.

MR. KIMELMAN: May I ask Mr. Diaz what his writing is, what he wrote there, out of the presence --

THE COURT: It is in English, you read it, it is English.

MR. MAHLER: I would object to that, Judge. I don't think that it should be used for the double-edged purpose, and I would ask that only the warrant side be admitted into evidence.

THE COURT: The warrant is admitted.

If there is any statement there that may be fairly used on cross-examination, I will allow it.

What you say is not true that it may not be used for one purpose, it may be used for any purpose.

MR. MAHLER: I would ask, though, Judge, that only the warrant be put in and not the return.

THE COURT: The warrant is in.

MR. MAHLER: Is the return?

THE COURT: Do you agree that is English?

MR. KIMELMAN: Yes, it was difficult for me to read it.

MR. MAHLER: Is the return also a part of this exhibit?

THE COURT: Yes, yes.

(Continued next page)

BY MR. KIMELMAN:

Q Mr. Diaz, look at Government's Exhibit 8 in evidence and tell us what you wrote there.

A For me to read this for you, I'm going to tell you why --

THE COURT: No, just answer the question.

THE WITNESS: All right.

THE COURT: Read out what you wrote there.

A "This here Michael W. Campbell has been pushed out of the store for the same reason on March 26, 1974, by owner of store, Israel Diaz, for use in basement without permission."

Q Who is Michael Campbell?

A Well, I figure that the Michael Campbell that I pushed out the day before the search warrant, and he wrapped me up for something, so I write it over there for me to remember.

Q Well, did you know that Mr. Michael Campbell is of the Drug Enforcement Administration?

A I didn't know, I thought it was the guy I pushed out, and he put a different name.

Q Do you know now if Mr. Campbell is a Special Agent of the Drug Enforcement Administration?

A I don't know him.

Q How did you get the name Michael Campbell?

A It's over there (indicating).

Q Where is it here?

A It's right over here (indicating).

THE COURT: Did you write that, did you write the name Michael Campbell?

THE WITNESS: Yes.

THE COURT: The question is, How do you identify that person as Michael Campbell?

THE WITNESS: I figured I pushed that guy out of the basement that day before the search.

Q Where did you get the name Michael Campbell?

THE WITNESS: Over here, your Honor. (Indicating) Michael W. Campbell.

THE COURT: All right.

MR. KIMELMAN: I ask the Court to take notice of the fact that he was the one who signed the warrant.

THE COURT: It says that?

MR. KIMELMAN: "I Swear this inventory is a true and detailed account of all the property taken by me on the warrant," signed Michael W. Campbell.

THE WITNESS: I didn't, I didn't took the search warrant, Fiffe was there at the store.

BY MR. KIMELMAN:

Q Is that what it says there?

A That is what it says, yes.

Q Now, you say that you thought that this Michael Campbell was the same one that you pushed out the day before?

A I figured that the name, that the name that is put on there, the search warrant, was -- was the kind of name you can have for anybody else, I didn't know it was any Agent, or anything.

Q You told us before that you thought that the person who was down there the day before lived upstairs.

A Right, right.

Q Do you know of any Michael Campbell who lived upstairs?

A No, but I am saying that I figure he was putting that kind of name to protect himself because I pushed him out of the store, because the way they built the trapdoor is the way they broke one of my walls, it's a hole about -- two square feet. I didn't recognize it, I didn't see it, because I had the books and the table and the desk, and lots of other things that was in front of the hole right in the wall, hiding it, and I didn't see it.

Q You never saw the trapdoor?

A Not until that point, and I never saw the hole on the side of the building, either, because I used to go over there, and I didn't, I wouldn't suspect nobody would break a

brick wall like a store, in a store.

Q Now, Mr. Diaz, I show you what has been marked as Government's Exhibit 8 in evidence, and I ask you if you would tell us what was written as to the property taken from your store that day.

Would you read that?

MR. MAHLER: I will object to having him read it.

THE COURT: It is in evidence.

Objection sustained.

A It is a number --

THE COURT: No, objection sustained.

BY MR. KIMELMAN:

Q Now, Mr. Diaz, was a glass bottle labeled lactose and --

A I don't know.

Q (continuing) -- taken from the store?

A I don't know.

THE COURT: I will allow you to read the items on the return if you wish.

MR. KIMELMAN: Thank you, your Honor.

MR. MAHLER: I would object, there is no foundation.

He already testified that he wasn't there.

THE COURT: Mr. Mahler, did I hear you say you

have no objection to the warrant going in, everything down to the Magistrate, which includes --

MR. MAHLER: No, I have an objection --

THE COURT: Wait, please.

But you object to the writing?

MR. MAHLER: Yes.

THE COURT: All right, read it.

MR. MAHLER: May I have a side bar?

THE COURT: The jury may be excused.

(The jury then left the courtroom.)

MR. MAHLER: In the first instance, this document was made available to the Court as a courtesy by myself. This is a counsel-privileged document, I believe this is my copy, this was my note, the note that my client made to me, and I wasn't given a chance, and I didn't want to, in front of the jury, make too strenuous objection to using the writing of my client.

Mr. Kimelman asked me if he could borrow my copy at the beginning of the trial, that is why my copy is in evidence.

THE COURT: What is your point?

MR. MAHLER: The point is now that this is a communication that is, I think, a privileged communication.

THE COURT: Are you objecting to it?

MR. MAHLER: Yes.

THE COURT: You say that is a privileged communication?

MR. MAHLER: Yes, this one, this is a defense document, it is my document.

THE COURT: Was this written to you, or written on the paper at the time he said he pushed somebody out as his memorandum?

MR. MAHLER: I don't know at what time he wrote it.

THE COURT: Don't you remember the testimony?

MR. MAHLER: I assume that his testimony is that he wrote it soon after he got it.

THE COURT: What makes that a privileged communication?

MR. MAHLER: Because this document is from defense counsel's files, those notes, it was as a courtesy.

THE COURT: Is everything at counsel's table privileged, or don't you believe that it is intended to be privileged and confidential, that then it is?

MR. KIMELMAN: Your Honor, Mr. Mahler gave that to me at the hearing, we have the warrant, and he put it into evidence.

THE COURT: You offered it?

MR. MAHLER: I expressly told you at the time that there was writing on the bottom which was my client's writing, and I didn't believe there would be any reference made to it.

THE COURT: You said that?

MR. MAHLER: Yes, I did say that.

THE COURT: Well, I can't remember that far back, but I have to check that out.

MR. KIMELMAN: I have no recollection of that being said.

THE COURT: I think that more reckless statements are made, they don't matter, it is just for the moment, and as to whether it helps or hurts the client, not whether it is true or not, or whether it is admissible or not.

What is the point you are making now, are you moving to strike it?

MR. MAHLER: Yes.

THE COURT: On what ground?

MR. MAHLER: On the ground that we are now -- First of all, I don't think there has been any opening of any door at this stage in the proceedings to admit this warrant into evidence.

THE COURT: Do you know that your client referred

to the search warrant?

MR. MAHLER: That is right, he did.

THE COURT: And in his testimony he talked about the search warrant.

MR. MAHLER: I still don't think that gives latitude to allow in all of the return of the search warrant, in fact, I don't even know, after Mr. Kimelman's cross-examination, whether there is any more legal basis for allowing him to introduce the findings of the search warrant; I think that he has cleared up any doubt that he might have, and which he might have tried to clear up on rebuttal: In other words, I don't think there is any more purpose for introducing the items seized from the basement.

THE COURT: How did you wander from the search warrant into the items, how did we get to that, we were talking about the search warrant?

MR. MAHLER: The search warrant is a search warrant which is my copy, it is from my file.

THE COURT: You think that is a reason it may not be used?

MR. MAHLER: I don't believe so, especially if it has writing of my client and is part of the work product of my case.

THE COURT: Now you say it is your work product?

MR. MAHLER: Yes, as part of my case, notations made by my client, or the work product of my client. I loaned this copy to Mr. Kimelman to use before the Court.

THE COURT: No, you used this copy in the hearing. Diaz referred to it as the copy he received, and said he discussed it with Mr. Fiffe. He brought it into the case, if you hadn't brought it in before, and as far as the statement he made on it, of course it may be used.

(continued on next page.)

MR. MAHLER: Will Mr. Kimelman reveal his entire statements, that he got his own case notes from the agent so that I can cross-examine the agent from them.

THE COURT: I don't know whether he will or not. Why don't you ask Mr. Kimelman sometime today?

This is just time consuming, I don't see that is before me at all. All I see before me is a search warrant.

MR. MAHLER: I would like at this time to take the opportunity while the jury is out to move for a mistrial on the grounds that the Court's questioning to my client concerning whether he used the out door to the basement in the wintertime when there is snow on the ground revealed your incredulousness as to his answer.

THE COURT: You think that I should not ask any questions.

MR. MAHLER: I don't think that at that particular moment in the trial that those questions were in order and I respectfully move for a mistrial.

THE COURT: You think this showed bias?

MR. MAHLER: Yes, I do, I respectfully say that I do, I think you took away from the credibility of my witness by doing that, I don't think that was a

Court question at that time to ask him twice whether or not he used it in the wintertime.

THE COURT: Well, I would say that if he takes care of the boiler and wants to make statements certainly which I understood and the jury understood to the effect that when he takes care of the boiler, and you usually take care of a boiler in the wintertime, in the heating season, that he didn't bother going down the trap door but he goes outside and uses the outside door, and that is even in the snow: I think it is important for the jury to understand that is what he does, and that is why I asked the question. I don't see any prejudice, and I don't think the Judge need sit by and be totally disinterested in what goes on in the Courtroom, I think it is perfectly proper.

The motion is denied.

Is there anything else that you can think of while the jury is out so we don't --

MR. MAHLER: Yes.

THE COURT: Anything else.

MR. MAHLER: Yes.

I move to strike the questions and the answers in response to Mr. Kimelman's questions concerning what was found in the store, I think that was highly

prejudicial, with lactose or any of the other items, if they were found in the store when Mr. Kimelman knows there was no basis for the question.

THE COURT: Overruled.

MR. MAHLER: They were found in the basement.

THE COURT: It is proper on cross-examination. Overruled, it is proper on cross-examination.

Seat the jury.

MR. KIMELMAN: Your Honor, should I just read the items.

THE COURT: Yes, it is in evidence, you may read it.

(At 2:30 o'clock p.m. the jury took its place in the jury box.)

THE COURT: The original is in the Court's file, I believe it should be.

MR. KIMELMAN: I believe so, your Honor.

THE COURT: All right.

MR. KIMELMAN: Government's exhibit 8 in evidence reads on the back:

"The following is an inventory of property taken pursuant to the warrant:

"1: An amber glass bottle 16 ounces labelled lactose, hydrose, USP.

"2A: One clear plastic bottle containing white powder approximately 10 ounces.

"3: One plastic spoon.

"4: One roll plastic baggies.

"5: One strainer containing suspected residue.

"6: One brown paper bag with writing and numbers."

CROSS-EXAMINATION

BY MR. KIMELMAN: (Cont.)

Q Mr. Diaz, do you have any knowledge of any of these items?

A No, sir.

Q Do you have any idea why they were in the basement of this clothing store?

A No, sir.

Q Do you have any idea how they got there?

A Well, it's got to be by somebody, I don't know.

Q Mr. Diaz, did you ever give Juanita Guzman any cocaine to sell?

A No, sir.

Q Did you ever -- strike that.

Were you in the cocaine business with Juanita Guzman?

A No, sir.

Q Did you ever authorize her to sell cocaine for

you to anybody else?

A What is that?

Q Did you ever authorize her to sell cocaine to anybody else?

A No.

Q Did you ever tell Juanita Guzman that you had cocaine?

A No, sir.

Q Did you ever tell Juanita Guzman that you sold cocaine?

A No, sir.

Q Did you have any idea why she would tell --

THE COURT: Objection sustained.

MR. MAHLER: I object, I move for a mistrial.

THE COURT: What does the record say, Mr. Karr, will you repeat what you have got on the record.

(The reporter repeated the last question to the point it stopped.)

THE COURT: Is that the basis for your motion for a mistrial.

MR. MAHLER: Yes.

THE COURT: Motion denied.

MR. KIMELMAN: I have no further questions.

THE COURT: Anything further?

Any redirect?

MR. MAHLER: Yes.

I am afraid I am constrained to have a side-bar.

THE COURT: The jury may be excused.

MR. MAHLER: I am sorry.

(At 2:35 o'clock p.m. the jury left the Courtroom.)

THE COURT: I had tentatively decided to exclude the tapes and in light of the cross-examination I am making a definite determination.

MR. KIMELMAN: May I have the Court's basis, the Court's reasoning.

THE COURT: This is the reason:

The only possible basis for that conversation coming in is that Guzman was a part of the conspiracy and she discussed this defendant with an undercover policeman and that that binds the defendant.

Now, it may not be used to attack credibility, you can't do it indirectly. It may not be used to refute his testimony that he made statements to Guzman, the one to refute that is Guzman, not someone who says Guzman told it to him.

I think that these tapes are reliable and dramatic and will be misused.

I think the Government miscalculated and saved the tapes more or less for rebuttal, and I don't think this is proper rebuttal.

Now I normally do not abide by these fine classifications, but where the Government is aware of it, where it is unfair to use it, where the use of it will be misunderstood, then I don't think the Government should use it.

MR. KIMELMAN: Your Honor, if I may:

This is Juanita Guzman's own voice on the tape and it will be testified to that effect, it is just not the statement of this undercover police officer that she said something, it is her own statement.

THE COURT: Why is it admissible?

(Continued next page.)

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MR. KIMELMAN: Your Honor, this defendant just denied on cross-examination that he ever dealt with Juanita Guzman in the cocaine business.

THE COURT: That is her statement, the defendant should have the right to cross-examine.

MR. KIMELMAN: In the normal case, I would agree with the Court, but there is also a second exception, and that is the exception that the Court should recognize, and it is the Government's contention that this is an exception to the hearsay rule, because she is a co-Conspirator, and this was in furtherance of the Conspiracy.

THE COURT: But what you miss is that this is in rebuttal.

MR. KIMELMAN: That doesn't change it because it is on rebuttal.

THE COURT: Of course it changes, because the purpose on the direct case is to prove that the Conspiracy was active and in business, and so the various transactions can be introduced, and the first step, if the defendant has proved to be a member of the Conspiracy, is then to have these conversations bared, but what you are saying is that you want to really use this to destroy his credibility, when he says he knows nothing about the

Conspiracy, when he denies that he had entered into the Conspiracy.

MR. KIMELMAN: Juanita Guzman would no more be available on the direct case or cross-examination than she is for rebuttal.

THE COURT: On the direct case, her statement, given by a Police Officer, and the recording, does nothing more than verify the conversation, it is the Police Officer saying --

MR. KIMELMAN: That is correct.

THE COURT: (continuing)--Guzman told me.

MR. KIMELMAN: That is correct.

THE COURT: All right, we are in agreement, Mr. Kimelman, but we don't agree on the result.

I say it is an unfair way to use it.

Now, if you came in with the excuse that the tape was unavailable, and you couldn't find the man, or something like that, I would say, "Well, that gives me a reason for at least opening up the direct case." But it was available, the Government was aware. All I can say is it's too late.

I think it is very important testimony if used for the wrong purpose. If you had used it for the right purpose, and in the right place, I don't think it would

have the effect that it has now.

MR. KIMELMAN: The Government, of course, will object to the Court's ruling.

THE COURT: I'm sorry you can't appeal, Mr. Kimelman, because I think the Government is entitled to review, but unfortunately --

MR. KIMELMAN: Perhaps --

THE COURT: (continuing) -- that isn't the law.

MR. KIMELMAN: Well, perhaps there will be an appeal.

THE COURT: Of my order now?

MR. KIMELMAN: No, sir.

THE COURT: Oh, you mean if there is a conviction. They wouldn't even look at it because it wouldn't be a point raised, so what difference would that make?

What do you have to say?

MR. MAHLER: I don't think that there is any allegation here that cocaine was recovered from the store, is there?

MR. KIMELMAN: No.

THE COURT: I think that something should be said, or people be made available, or a concession be made that the white powder was not a narcotic drug of any kind, certainly not cocaine.

MR. KIMELMAN: The Government will stipulate and will attempt to enter into a stipulation with Mr.Mahler as to exactly what was found, and where it was found.

THE COURT: All right.

MR. KIMELMAN: This will avoid certain portions of the Government's rebuttal case, bringing in a chemist, and bringing in the Agent who executed the warrant, that is, if Mr. Mahler is agreeable to that, the Government is agreeable to that.

THE COURT: There is the offer.

MR. MAHLER: All right, I would be agreeable to that, I would stipulate.

THE COURT: What is the stipulation?

MR. KIMELMAN: I believe it would have to be a two-part stipulation, that it is stipulated that if Michael Campbell, a Special Agent of the Drug Enforcement Administration, were called to testify, he would testify that on March 26, 1974, he seized the items mentioned on the return of the search warrant;

That the powders found turned out to be lactose, and that lactose itself was found in another container;

And that if a Chemist for the Drug Enformement Administration -- and I would have to look at the report to see the Chemist who analyzed it -- were called to testi

he would testify that these substances were in fact lactose.

THE COURT: That is one form of stipulation, you can also stipulate to the mutual fact that the following was seized in the basement, lactose --

MR. KIMELMAN: Yes, sir.

THE COURT: Lactose in a certain type container, and the other items.

MR. KIMELMAN: Yes.

I would prefer, your Honor, if this could be a written stipulation that we could enter into this afternoon --

THE COURT: All right.

MR. KIMELMAN: (continuing) -- because that way it can then be an Exhibit in evidence that the jury has available to it.

MR. MAHLER: Do I understand, Judge, that you are still ruling that you would permit them on rebuttal to introduce all of these items?

THE COURT: Exactly. You can have an exception, and you can stipulate, and having made the ruling, the exception is preserved, and to avoid the waste of time, you are willing to stipulate as follows, so it is very clear.

But I don't see why, if it is lactose, a commercial material, that either side should talk about, if someone were called they would testify, why not say, These items were found, period. It is simple.

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(continued on next page.)

MR. MAHLER: That's what I --

THE COURT: Both of you want the ultimate fact found, don't you?

MR. KIMELMAN: Yes, sir.

THE COURT: All right, stipulate to it.

MR. MAHLER: The stipulation should be it was in the basement.

THE COURT: You might even want to say the negative thing, no cocaine or any other drugs were found.

I think he's entitled to that.

MR. KIMELMAN: Along with a second part of that stipulation.

THE COURT: Sure. I can tell you this: That I was under the impression that there was a drug found. Why shouldn't it be right there in the stipulation, no drug found.

MR. KIMELMAN: I still prefer a stipulation, if possible, typed up.

THE COURT: In light of that negative agreement I think he would favor it, too.

MR. MAHLER: I think I would.

THE COURT: So put it down. Why shouldn't it be clear?

MR. KIMELMAN: Perhaps at some time this

afternoon we can put it down.

THE COURT: Are you going to have any redirect?

MR. MAHLER: Not that I can think of, no.

THE COURT: Seat the jury.

Hold the jury for a few minutes, Martin. We will take a two or three minute recess.

(Recess taken.)

(Out of the hearing of the jury.)

MR. KIMELMAN: May I ask --

THE COURT: Just a moment.

Mr. Mahler is missing.

MR. KIMELMAN: May I have permission to ask one more question of Mr. Diaz?

THE COURT: Sure. Let's get everybody together. In the light of this stipulation will you have any rebuttal witnesses?

MR. KIMELMAN: Yes, sir.

THE COURT: I might be compelled to charge tomorrow and if the jurors haven't agreed on a verdict have them come back the next day. If I don't finish the charge at least, it means that I would have to continue the case either Saturday or Monday.

I have other commitments on Saturday and Monday is a holiday. I know we have a revolution in

3 the making because one judge is having a trial on Veterans's Day and the Court Reporters already have their picket signs out.

MR. KIMELMAN: I would anticipate two rebuttal witnesses.

THE COURT: Well, if you can complete today on --

MR. KIMELMAN: One witness is prepared. Then I would request a short recess.

THE COURT: Maybe we can finish the summations then I can charge early in the morning and we won't have any problem.

MR. SUTTON: Did you say summations this afternoon?

THE COURT: Yes, I am hoping.

(Jury present.)

CROSS-EXAMINATION

BY MR. KIMELMAN:

Q Mr. Diaz, did you ever deal in cocaine at Jose's Bar?

MR. MAHLER: Objection.

THE COURT: Overruled.

Q Did you ever negotiate a sale of cocaine in January of 1974?

THE COURT: Sustained as to form. It calls

for a conclusion. Did you ever talk to anyone about cocaine on January of 1974?

THE WITNESS: No, sir.

Q In December of 1974?

A No, never --

THE COURT: Do you mean '73?

THE WITNESS: No.

Q And February 1973?

A Never.

Q Did you ever have a meeting with Mr. Miranda in January of 1974 at Jose's Bar?

A It could be, it have to be me. I have my own people and I don't go no place.

Q Did you ever have a discussion with Mr.Miranda in January of 1974 at Jose's Bar about cocaine?

A No, sir.

THE COURT: You shook your head before and Mr. Kimelman said about cocaine. Are you saying you never had any discussion at Jose's Bar?

THE WITNESS: No, sir. At all.

Q You never had a discussion?

A At all. No where.

Q At any time?

A At all.

MR. KIMELMAN: That's all.

REDIRECT EXAMINATION

BY MR. MAHLER:

Q Could you describe the trapdoor that you talk about?

A The trap door is about the size of this, a little wider, it is under my desk.

THE COURT: Measure it. That's an 18-inch ruler.

A This will be about two times, about this size and about this size wide.

THE COURT: About 18 inches?

THE WITNESS: No, two times.

THE COURT: Both ways?

THE WITNESS: Yes, sir.

THE COURT: About three feet by three feet?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. MAHLER:

Q What is it constructed of? Is it wood?

A It is wood.

Q And how do you open it?

A Just lift it up.

Q Is there a handle on it?

A No.

Q By what means do you lift it? How do you get a grip on it?

A If you are going to lift it you have to list the edges and somehow you get it open.

Q Does it disappear with the floor, is it even and level with the floor?

A Yes.

Q And where in the store is it?

A That's way in the back of the store, it is about 85 or 70 feet in the front of the store.

Q What particular -- what room is that?

A That's -- would be like three-quarters of the length of the store.

Q Now, did there ever come a time when you discovered another way into the basement?

A Another way in the basement or into the store?

Q Into the store.

A Yes.

Q When was that?

A That was when I was nailed in the entrance, the trap door, I removed my file cabinet and there was a hole leading to the following store. I didn't know it was there.

Q Where does the hole go?

A To the yard next door.

Q In the basement, you said there was a boiler; is that correct?

A Yes.

Q Was the boiler there when you moved into the store?

A There was an old boiler. It was not in service. I bought a brand new one.

Q When did you do that?

A I don't remember the date.

Q Was it in 1973?

A Yes.

Q What time of the year?

A Before the winter.

Q What did this boiler -- did it have to be maintained?

A No -- well, you have to maintain it. You have to put oil in it. If anything failed to work the people that serviced me the oil would handle that. I don't own a boiler system. I have the thermostate upstairs.

Q Is it your testimony you only have to put the oil in at one time?

A Yes, the company comes in and fills it up and mails me the bill and that's all.

8 Diaz - recross

MR. MAHLER: That's all.

MR. KIMELMAN: No further questions.

THE COURT: Anything further?

RECROSS-EXAMINATION

xx BY MR. MATARAZZO:

Q Mr. Diaz, would you look at Mr. Vivas.

A Yes.

Q Do you see him?

A Yes.

Q In your entire life, going back from the first day this case went on trial, that is before October 15th or 16th of this year, 1974, did you ever in your life see that man?

A No, sir.

Q Anywhere?

A No, sir.

Q In your social intercourse, in your discussion at friends'homes,in a bar,in a car, in your store, anywhere, did you ever hear that man's name mentioned?

A No, sir.

Q Did anyone mention it to you?

A No.

MR. MATARAZZO: No further questions.

THE COURT: Do you have anything, Mr. Sutton?

9 Diaz

MR. SUTTON: No, sir.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Mr. Mahler, next witness.

MR. MAHLER: This defendant rests, your Honor.

THE COURT: Rebuttal?

MR. KIMELMAN: Yes, sir.

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SAUL RODRIGUEZ, a witness having been duly sworn, took the witness stand and testified as follows:

THE CLERK: Full name?

THE WITNESS: Saul Rodriguez, Detective.

DIRECT EXAMINATION

BY MR. KIMELMAN:

Q Sir, by whom are you employed?

A I'm employed by the New York City Police Department.

Q What capacity?

A I'm a detective assigned to the Organized Crime Control Bureau, Narcotics Division.

MR. SUTTON: Might we have a side-bar, your Honor.

THE COURT: Your objection in open Court.

Go ahead to make it.

MR. SUTTON: I think the Government knew what it was going to ask this man and didn't disclose it. That kind of identification, I think, you already ruled on, at least I know it's been ruled on and should not have been discussed that way, the descriptions just is bad.

THE COURT: Might I have the question and the answer?

(Reporter reads back last question and answer.)

THE COURT: Objection overruled.

MR. SUTTON: That's the whole answer?

Q How long so employed?

A Approximately three years and four months.

Q Were you so employed on January 17th, 1974?

A Yes sir, I was.

Q Were you on duty on the night of January 17th, 1974?

A On what date, sir?

Q Were you on duty on the night of January 17th, 1974?

A I'd have to look into my activity reports.

THE COURT: Do you have them with you?

THE WITNESS: No sir, I do not.

Q Were you acting in an undercover capacity on January 17th, 1974?

A Yes sir, on January 17th, 1974, I was.

Q And were you in the vicinity of Broadway and Briggs Avenue on that night?

A Yes sir, I was.

Q And could you tell us where exactly you were?

A I was in a bar, Jose's Bar at the corner of Broadway and Briggs in Brooklyn.

Q What time did you get to that bar?

A I got to that bar at about 6:55 p.m.

Q Did you have occasion to have a conversation with

anyone in that bar?

A Yes, at about 7:10 p.m., I had a conversation with someone, yes.

Q And would you describe that individual to us?

A The individual was known to me as Diaz.

Q Do you see that individual in the Courtroom today?

A Yes sir, I do.

Q Would you point him out to us?

A He's the gentleman wearing the tan sports jacket with the yellow knit shirt on the outside (indicating).

THE COURT: Would you please stand, Mr. Israel Diaz-Martinez?

(Defendant complies.)

THE COURT: Is that the gentleman you pointed out?

THE WITNESS: Yes.

THE COURT: Let the record show the defendant is Israel Diaz-Martinez. You may be seated.

(Defendant complies.)

Q Have you ever met this gentleman before that night?

A Yes sir, I had.

Q On how many occasions?

A I had met him on one occasion. I had seen him on another occasion.

Q And could you tell us where you had seen him?

A I had seen him at 293 Grand Street or Grand Avenue, a clothing store.

Q Had you been inside that clothing store?

A Yes sir, I had.

Q Is that where you saw Mr. Diaz?

A Yes sir.

Q Now, on the night of January 17th, 1974, did you have a conversation with Mr. Diaz?

A (No response.)

Q Did you have a conversation with Mr. Diaz in Jose's Bar?

A The night of the 17th, yes sir, I did.

Q Would you tell us what Mr. Diaz said, if anything, and what you said at that time?

A I told Mr. Diaz that I was looking to buy a half ki of coke and he stated that there was nothing around right now, but that he expected something to come in within a couple of days.

Q What did you reply?

A I replied that I was interested in buying a half a ki. Mr. Diaz replied to that that I should call the

clothing store and speak to whoever was at the clothing store that he would be there also.

Q Did he mention any names?

A Yes sir, he did.

Q What were those names?

A He told me that if he wasn't there that I could speak with Fiffe.

Q Did you know who Fiffe was?

A Yes, I knew him to be one Manuel Fiffe.

THE COURT: How do you spell Fiffe?

THE WITNESS: F-i-f-f-e.

MR. KIMELMAN: No further questions.

THE COURT: Do you have any questions, Mr. Sutton?

MR. SUTTON: No.

MR. MATARAZZO: I have no questions of this witness.

MR. MAHLER: I want to know if there's any material or reports.

MR. KIMELMAN: Might the jury be excused?

THE COURT: The jury may be excused.

(Jury leaves Courtroom.)

MR. KIMELMAN: Might I have this marked?

THE CLERK: Two-page --

THE COURT: Bring the jury in.

(The jury entered the courtroom.)

CROSS-EXAMINATION

BY MR. MAHLER:

Q Officer Rodriguez, on the particular night in question, January 17, 1974, you've testified that you went to a certain bar and grill, Jose's; is that right?

A Yes, that's correct.

Q And did you go there with anyone else that night?

A Yes, sir, I did.

Q Who else did you go there with?

A I went there with a confidential informant.

Q What is his name?

MR. KIMELMAN: Objection.

THE COURT: Sustained.

MR. MAHLER: I respectfully except.

Q Could you describe the person to us?

MR. KIMELMAN: Objection, your Honor.

THE COURT: Give a general description of him --

The jury may be excused.

(The jury left the courtroom.)

THE COURT: What's the purpose of this, Mr. Mahler?

10 Rodriguez-voir dire

MR. MAHLER: I would like to probe into the circumstances of the incident, your Honor.

THE COURT: Is the confidential informant still of value to your work?

THE WITNESS: Yes, sir, he is.

THE COURT: Would disclosure materially impair his effectiveness?

THE WITNESS: Yes, sir.

THE COURT: Why would you generally like to probe, Mr. Mahler?

MR.MAHLER: I think as to the credibility of the witness on this particular one point as probably one of the few areas open to me to inquire as to the evening and the circumstances under which this conversation took place.

THE COURT: How many people were present in the bar at that time?

THE WITNESS: From what I recall, it might have been about seven, six, seven people.

THE COURT: Other people you know that were friends of the defendant Diaz present at that time?

THE WITNESS: Yes, sir.

THE COURT: Was he in conversation with others?

THE WITNESS: Yes, sir, he was.

THE COURT: I find that the disclosure of the identity of the informant would impair the effectiveness of the informant. On the other hand, from what Mr. Rodriguez tells me, this defendant has other witnesses that he can call to disprove to challenge the credibility of this witness' testimony.

Don't ask any further questions about the identity of the informant, Mr.Mahler.

Seat the jury.

(Jury enters courtroom.)

Q Would you please describe the outside of Jose's Bar as you saw it on that night?

A The outside is painted white. The letters, "Jose," I believe, are painted brown or brown wood. They might be about three feet in height and I believe he's got -- the bar has a lamp or two lights affixed on the outside.

THE COURT: What does it say on the sign?

THE WITNESS: "Jose."

THE COURT: Just "Jose"?

THE WITNESS: Yes, sir.

Q When you went into the bar, how many people were in the bar?

A About a half dozen people.

Q Now, is it your testimony that you walked right

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(On October 24, 1974, at 9:40 o'clock a.m., the jury took its place in the jury box.)

THE COURT: Yes, Mr. Mahler?

MR. MAHLER: Your Honor, I wish to recall the defendant, Diaz-Martinez, to the witness stand.

I S R A E L D I A Z - M A R T I N E Z , called as a witness, having been previously duly sworn by the Clerk of the Court, resumed the witness stand and testified further as follows:

THE COURT: Mr. Diaz, you understand you have been previously sworn and you are still under oath?

THE WITNESS: Right.

DIRECT EXAMINATION

BY MR. MAHLER:

Q Mr. Diaz, on Friday you heard, did you not, the testimony of a detective named Sol Rodriguez?

A What was that again?

THE COURT: That was yesterday.

MR. MAHLER: On Wednesday, yesterday.

THE WITNESS: Wednesday.

Q You heard the testimony of the detective by the name of Sol Rodriguez; did you not?

A That is correct.

Q And did you hear him testify that on January 17, 1974, that he had met you and spoken to you at Jose's Bar

at about seven o'clock in the evening?

A Yes.

Q Did you ever meet such an individual as Sol Rodriguez?

A Not that I remember seeing any Rodriguez or any other people that look like him, never.

Q I am talking not only about that day, did you ever at any time ever meet anybody like that?

A I said never.

Q Have you since ascertained what day of the week that was, January 17th?

A Well, I find out it was on Thursday.

Q And is there any reason why you could not have been in that bar on a Thursday at seven o'clock?

A It would be impossible for me --

Q Why is that?

A -- (continuing) -- to be at the bar because on Thursday is the day that all the stores around are open late for shopping, and especially my store, I have to supply a lot of stores and get the peddlers to be ready for Friday, that is payday for people, it will be very impossible for me to close the store before ten o'clock at night, at least.

Q Do you run a retail business?

A Retail and wholesale.

Q Now, you heard him testify that on a previous occasion he had come to your store.

Did you ever see anyone while you were in that store using that basement entrance in the back of your store?

A No.

MR. MAHLER: I have no further questions.

THE COURT: Any cross?

MR. KIMELMAN: Yes, sir.

THE COURT: I assume none of the other defendants' counsel want to ask any questions.

MR. SUTTON: No, your Honor.

MR. MATARAZZO: No, your Honor.

CROSS-EXAMINATION

BY MR. KIMELMAN:

Q Mr. Diaz, you say that it would have been impossible because Thursday is a busy night for you?

A Yes, sir.

Q And didn't you tell us yesterday that you go in and out of the store all the time?

A Yes.

Q And that you are not there all the time?

A I said during the daytime, that is past, after six.

Q You are not at the store, are you?

A Every night I have to be at the store after five, six o'clock.

Q You are in that store every single night?

A Yes, sir, I have to be there every single night to check the bills and the orders. I did testify to that yesterday.

Q You never missed a night?

A I never missed a night, I have to close the store and check the bills.

REDIRECT EXAMINATION

BY MR. MAHLER:

Q Ever miss a Thursday night?

A Even Monday, Monday, people in the stores are sold out, they need more merchandise, I have to supply them, I get the orders Monday and bring it Tuesday, and I get orders Thursday and I have to bring it in Friday. I have to supply all the peddlers at different corners, different guys from the station wagons and cars selling pants. I think it is a very good night for me.

Q You are open for the retail business on Monday nights and Thursday nights?

A Sure, sure.

MR. MAHLER: I have no other questions.

(continued on next page)

RECROSS EXAMINATION

BY MR. KIMELMAN:

Q Mr. Diaz, Mr. Diaz, did you ever see Mr. Rodriguez before yesterday?

A No, sir.

MR. KIMELMAN: No further questions.

THE COURT: Anything further?

You may step down.

Thank you.

(The witness was excused.)

MR. KIMELMAN: Your Honor, the Government would like --

THE COURT: We are still on the defendants' case.

Any other witnesses, Mr. Mahler?

MR. MAHLER: No.

THE COURT: The defendant Israel Diaz-Martinez rests?

MR. MAHLER: Yes, he does.

MR. KIMELMAN: Your Honor, I believe there might be some additional testimony. I would like to make an offer of proof to the Court.

THE COURT: Do you have the stipulation that you referred to?

MR. KIMELMAN: Yes, sir.

THE COURT: Have you seen it?

MR. MAHLER: I have signed it, it is all signed.

MR. KIMELMAN: I ask that it be marked.

THE COURT: Let it be marked.

Would you like to read it?

Let it be marked.

THE CLERK: Stipulation, 26 in evidence.

MR. KIMELMAN: Your Honor, perhaps the Court could explain to the jury exactly what a stipulation is.

THE COURT: A stipulation between the lawyers must be considered by you as a part of the record, it is in place of the evidence, and both lawyers agree that it would save time and that these were the facts, so what is stipulated to between the lawyers is binding on you, you must accept it as the facts.

MR. KIMELMAN: Thank you.

It is hereby stipulated, consented to and agreed by and between the undersigned that the following items were received from the basement of 293 Grant Street on March 26, 1974 by agents of the Drug Enforcement Administration:

"a: One amber glass bottle, sixteen ounces, labeled lactose hydrose, U.S.P;

"b: One clear plastic bottle containing ten ounces of lactose;

"c: One plastic spoon;

"d: One roll of plastic baggies;

"e: One strainer;

"f: One brown paper bag with writing and numbers on it.

"Two: No narcotics or controlled substances were found in or seized during the course of the aforementioned search."

It is dated today's date and signed by myself and Mr. Mahler.

THE COURT: Now --

MR. KIMELMAN: Your Honor, may I have an offer of proof as to the next witness?

THE COURT: Oh, yes.

The jury may be excused.

(At 9:45 o'clock a.m., the jury left the courtroom.)

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(The jury took its place in the Jury box.)

Charge of Honorable Jacob Mishler, Chief United States District Judge.

THE COURT: Madam Forelady and ladies and gentlemen of the jury:

We have reached that point in the trial where it becomes my duty to instruct you on the applicable law.

The lawyers have completed their tasks, they have performed their obligations, their obligations relate to the relationship they have with their clients.

Both the Government and the defendants are represented by attorneys. As you are aware, Mr. Kimelman's client is the Government, the three defendants are represented respectively by Mr. Sutton, Mr. Mattarazzo and Mr. Mahler.

Everyone is treated the same in this court room, Mr. Kimelman isn't given any greater or different consideration than Mr. Sutton or Mr. Matarazzo or Mr. Mahler; everyone is treated alike and that is what we mean by being fair.

But their job is as adversaries, each taking their respective side in the case and they act in

such a manner as to develop the evidence in the case on the issues that are before you. That is why we call this an adversary proceeding.

But there are two other participants in the trial, and that is the jury and the Court, and there is a difference between the Court and jury on the one hand and the lawyers for the parties on the other.

The lawyers are protagonists and as such perform their duty; they should demonstrate their partisanship and act in such a manner as will do an effective job.

The Court and the jury, on the other hand, are objective, nonpartisan. Each of us should look at our obligation and function as requiring determinations based on what the evidence is for the jury and on what the law is for the Court.

You are to make your determination free of all bias or prejudice or sympathy.

Now as between the Court and the jury, there is a distinct line of demarcation:

Each one is a judge, the jury is a judge and the Court is a judge. The jury has the sole authority to judge the facts, that means that the jury and the jury alone determines what happened -- based on the

evidence of course. The Court should make rulings on the law based on what the Court believes is the law. Each one should respect the authority of the other and be careful not to encroach upon the authority of the other. I don't intend in anyway to suggest any findings whatsoever. That is your job. You on the other hand must respect the authority of the Court and you must accept the law as the Court charges it.

I will charge you on any number of principles concerning witnesses, the statutory law, the essential elements of the crimes charged and other principles.

You must accept the law even if you don't like the law, even if you feel that Congress was wrong in passing the Drug Abuse Act of 1970, about which I will charge you. The Congress passed the law and we must all accept it as the law. Our individual and personal dislikes as to any instruction that I give you on the law should be set aside.

If each one of us knows and respects the authority of the other and understands the function of the lawyers and that a trial is an adversary proceeding, then I think that it will go a long way towards giving the parties a fair trial.

My rulings, my statements during the trial with reference to the rulings, and even a display of irritation that might have been evident during the trial should not influence your determination here; there is nothing personal in my rulings. I hope you understand that the Court at least attempted to treat the lawyers fairly, decided the objections that were made based on what the Court understood the law to be, and that in giving you the instructions now I intend in no way to suggest any opinion which the Court may have as to the outcome of these proceedings.

You have before you a document called Memorandum of Verdict. I have struggled a long time over describing the document, but you might as well call it a scrap of paper. It has no standing in the trial as such. It is a useful tool for the jury. With it there is a copy of Count 1 and Count 6 of the indictment.

Count 1 and Count 6 are each a verbatim copy of those counts in the indictment while the Memorandum of Verdict is just a paraphrasing, a precepe of the charges, and when you go into the jury room to deliberate you may use it for your purposes. I will ask the foreman to take an extra copy with him and

mark it up to indicate your verdict and then sign it so I may have it as a record.

We were talking about the indictment. You must understand at the outset that the indictment is the method by which the law brings someone into court to face a charge and to which the defendants have pleaded not guilty. The statements in the indictment should not be assumed to be true nor should they give any substance to the charges themselves.

The indictment is not proof of the charges. It is as if someone, the plaintiff, sued you in a civil case for $100 and would be saying to you, "You owe me $100." Well, if you come in to court and say, "No, I don't owe you $100," plaintiff could not come and say as proof, "Well, there you are, it is in the complaint." That is not proof of the obligation. The plaintiff has to have witnesses come into court and prove that you owe him a hundred dollars. The indictment is submitted to you just so you can keep your eye on the ball and understand that there are really five charges here, five trials in one, three in the first count against all three defendants and two in the second count against the defendants Bermudez and Diaz.

The Memorandum of Verdict is only a version of what is contained in the indictment so that you may have a precise view of what the charges are against these defendants. The indictment contains other parties and other allegations that might divert your attention from the precise charge and you must keep your eye on the precise charge to see if the Government proved the charge.

That is the effect of the two documents that are before you.

(Cont'd on next page.)

In every criminal trial the defendant is presumed to be innocent.

I will use the singular or the plural, but it means all the defendants except if I specifically refer to a charge and say this principle or this charge or this instruction refers to a particular defendant.

You are to assume otherwise that I am referring to all defendants.

All the defendants are presumed to be innocent. That is a time-honored presumption of Anglo-American law. It is a strong presumption, it says in effect you must conclude at the outset of the trial that the defendant is innocent of the crime charged, and that conclusion, that presumption remains with the defendant throughout the trial and throughout your deliberations and prevails unless and until the presumption is overcome by proof to the contrary, to wit by proof beyond a reasonable doubt that the defendant is guilty of the crime charged.

The effect of that is very significant: The defendants do not have to prove anything or offer any evidence to prove their innocence. They can rely on the failure of the Government to prove its case by proof beyond a reasonable doubt.

In other words, your function is not so much to find out if the defendants are innocent or if they are guilty; it is more precisely to determine whether the Government proved the guilt of the defendants by proof beyond a reasonable doubt.

In Scotland we have three verdicts -- I should not say "we have" I should say "They have" -- it is guilty, not guilty, not proved.

In this country we have only two, guilty, not guilty, but our not guilty verdict includes not proved.

The Government's burden is to prove the guilt of the defendant beyond a reasonable doubt. A reasonable doubt is a doubt which a reasonable person has after weighing all the evidence.

It is a doubt based on reason and common sense and the state of the record. It is not some vague speculative doubt, it is not some suspicion that you might have. On the other hand, it is not a doubt based on a distate to perform an unpleasant task.

A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act in a matter of importance in his own life.

Proof beyond a reasonable doubt is therefore

proof of such a convincing character that you would be willing to rely upon it unhesitatingly in the most important and weighty of your own affairs.

The Government's burden is not to prove the guilt of the defendant beyond all doubt -- there is a qualifying adjective -- it is beyond all reasonable doubt.

The Government's burden is not to prove that every bit of evidence offered in the trial is true beyond a reasonable doubt, the Government's burden is to prove every essential element of the crime charged, beyond a reasonable doubt.

Later in the charge I will charge you on what the essential elements of the crimes charged are.

Again, defendants do not have to prove their innocence; they do not have to offer any proof whatsoever; they may rely on the failure of the Government to prove the guilt of the defendant beyond a reasonable doubt.

What is evidence is classified as direct evidence or indirect, which is also called circumstantial evidence.

Direct evidence is the testimony of a witness of what that witness saw or heard. Indirect or

or circumstantial evidence is a method of determining a disputed fact by drawing an inference from established facts based on your good common sense and experience.

If you were sitting as a jury in a civil case, in a personal injury action, and Plaintiff A was suing Defendant B, claiming that B had passed a stop sign without stopping and struck A causing injuries, well, let us use that hypothetical situation, and let us assume Mr. Adler, my Court Deputy and myself were standing at the corner at the precise time and place where the sign was located; let us assume he had his back to the sign and I was talking with him and had the sign in full view and the roadway in full view: Well, if I were called to the witness stand and asked to testify as to what I saw, I might say, "Well, I saw a white 1974 Cadillac travelling at 65 miles an hour pass the sign, cross the roadway, strike B, and knock B down" -- knock A down, B is suing. Now, that is direct testimony of that disputed issue, the defendant saying, "No, I stopped first and then I proceeded," and Plaintiff A of course saying, "No, he continued and passed the sign without stopping."

Mr. Adler didn't see the vehicle pass the stop sign, but he is competent to testify about the circumstances from which a jury might draw a reasonable inference that that is just what happened.

He might testify that as he was speaking with me there came within his peripheral vision a white Cadillac travelling about, well, it is 65 miles an hour, pass behind him for a distance of about 150 feet, that two or three seconds later he saw it again and then saw the motor vehicle strike A, knocking A down.

Now you as a jury could draw from those circumstances the reasonable inference, based on your good common sense and your experience, that that motor vehicle passed the stop sign without stopping. The circumstances are that the motor vehicle was driving at 65 miles an hour and traversed about 150 feet in two or three seconds and that it would have been quite impossible for him to have covered these 150 feet in two or three seconds had he stopped and then proceeded.

So I say you may come to the same conclusion by direct evidence as you may be indirect or circumstantial evidence and the law does not hold that one type of evidence is better than the other type of

evidence, the law says that at times circumstantial evidence is of a better quality and that at other times direct evidence is of a better quality.

The law requires the Government to prove its case on both the direct and the circumstantial evidence.

Now I have used the term "inference" when I referred to circumstantial evidence and I used the term "presumption" when I referred to the presumption of innocence.

There is a difference.

An inference is a conclusion which the jury may make based on good common sense and experience; the example of that, of course, is arriving at a determination of a disputed fact from circumstantial evidence.

A presumption, on the other hand, is a conclusion which the law requires the jury to make and it continues until and only if proof to the contrary is shown by proof beyond a reasonable doubt, and of course the example of that is the presumption of innocence.

What is the evidence in the case? It is the sworn testimony of all the witnesses regardless of

who called the witness. It is not based on the number of witnesses each side called, it is based on the quality of the testimony that is offered.

It is the exhibits received in evidence regardless of who may have introduced them. It is the facts which have been stipulated to, and there was a written stipulation entered into. There may have been other stipulations entered into between the lawyers on the record but I don't recall that.

It is also the facts which have been judicially noticed by the Court. In other words, at times I said that a certain date of the month fell on a certain day of the week, that is a judicially noticed fact.

It may be helpful for you to know what is not evidence.

One, the statements counsel made in the openings and the statements or arguments counsel made in summations -- and of course, that includes their recital of the testimony, at times they recited from their own recollections. Well, that is not evidence. The evidence is what you heard, not what they heard.

The openings served a very useful function, they

alerted you to what was to follow. As one lawyer pointed out, the evidence does not come in any set pattern, any chronological order, and so if you know the theories of the parties you can more easily follow that testimony.

Summations, on the other hand, are intended to focus attention on what the lawyers regard as the important parts of the evidence in the record and of theories of inculpability, which were offered by Mr. Kimelman -- which mean theories of guilt -- and theories of exculpability which were offered by each of the defendants -- which mean their arguments to show that their clients are not guilty -- or, as I like to put it, the failure of the Government to prove the guilt of the defendant.

Matters stricken from the record are not a part of the record, and so if I directed the reporter to physically strike it from the court record you are to figuratively strike it from your memory and recollection.

(Cont'd on next page.)

Any random remark you may have heard in the courtroom is not a part of the record, just disregard it. If I made a statement, it is not evidence, just disregard it, and while I am at it, if I asked a question, it should have no greater significance to you than any other question asked; if you thought it was a silly question, disregard it, don't hesitate at all. The only reason I ask a question is that at times I may find there is something a little fudgy and uncertain in my own mind and I assume; if it is so in my own mind then it is probably in your mind, so I ask the question. It may be perfectly clear to you but it was confusing to me. I did not ask it because I wanted to bring out a particular bit of evidence.

There are times that the Court sustained objections to questions. You may not speculate on what the answer might have been if I had permitted the witness to answer. The point is I ruled as a matter of law that it should not be in this case and it is not in the case.

There are times that a lawyer asks a question and incorporates a statement in the question that wasn't supported in the record and the witness answered no. Well, you cannot assume that what the lawyer said

was true just because the lawyer incorporated that statement in the question. You see, lawyers test the credibility of witnesses and they may put questions to the witnesses that do not have support in the record. It is a way of testing credibility and is perfectly proper.

I might say that in cross-examining a character witness Mr. Kimelman asked, "Have you heard that Mr. Bermudez was arrested on a marijuana charge?"

The two witnesses who came as character witnesses said no. Well, that was offered for a very specific purpose, first to see what the witnesses knew about Mr. Bermudez' general reputation, and if the witnesses had answered in the affirmative, to determine whether it affected his character. If the witness said no, you may not assume in any way that he was arrested, there is no proof in the record that he was.

You, the jurors, are the sole judges of the credibility of the witnesses, which means the believe-ability of their testimony and the weight their testimony deserves. Scrutinize the testimony given and the circumstances under which each witness testified and every matter in evidence which tends to show whether a witness is worthy of belief. Con-sider each witness'

intelligence, language difficulty, the witness' demeanor on the witness stand. Did he answer fully, forthrightly? Was he evasive?

In that connection, of course, you understand that where a witness is directed to answer yes or no there are difficulties sometimes in answering yes or no. Use your good common sense on that. The lawyers have a right to control the cross-examination, there is nothing wrong with that. If witnesses were allowed to talk on and on on everything they like to say, you recognize that we would have pure chaos. So the control of cross-examination by counsel is very important for an orderly presentation of the case.

Take into consideration the witness' ability to observe the matters as to which he has testified, whether he or she shall have impressed you as having an accurate recollection of these matters.

Take into consideration the relation each witness might bear to either side of the case, the manner in which each witness might be affected by the verdict, the extent to which the witness is corroborated, supported, that means, and the extent to which a witness is contradicted by other evidence in the case.

I cannot recall whether a witness was faced

with a prior inconsistent statement during this trial, and that is what we call impeaching a witness, which means that a lawyer may ask a witness whether at a previous time he made a statement that is different than the testimony he gave before you. Well, as jurors, you decide whether the prior statement was inconsistent with the testimony, you decide whether it was just a normal variation in retelling the story, you decide whether it is inconsistent as to a material matter, then you determine the effect the prior inconsistent statement has on the credibility of that witness.

We had a number of expert witnesses, one was Special Agent Abbott and the other two were chemists, Mr. Weber and Mr. Sawinski. They expressed an opinion as to what a particular substance was. Now normally, witnesses, lay witnesses, may only tell the jury what they saw or heard. A lay witness cannot say to you, for example, "I think," or, "It probably is," or "It probably was." That is an opinion, that is a conclusion. But exceptions to that rule exist as to those whom we call expert witnesses. These are witnesses who, by education and experience, have become expert in some art, science, profession or calling.

Such a person may state an opinion as to relevant and material matter which they profess to be experts in, and they may also state their reasons for the opinion, as Mr. Weber and Mr. Sawinski spoke about the experiences they both had in analyzing cocaine as chemists.

Mr. Abbott said he had some instruction, as I recall, at some Drug Enforcement Administration School, or it may have been the agency that preceded that agency; and then he said that throughout his work, through his experience, he was able to express an opinion as to what a particular substance was.

Now, the mere fact that I determined that a witness is qualified to express an opinion doesn't mean you have to take that opinion. You can disregard it if you feel he wasn't qualified and that he shouldn't even have come before you. I don't pass on the weight of the testimony, I just determine whether you should see it at all and you determine whether you will give the expert opinion any weight. The expert witness' opinion should be weighed, and you weigh it just like any other testimony. All the factors I have just suggested to you concerning weighing the credibility, the believability of witnesses, applies to expert witnesses, of course.

While we are on the question of expert witnesses and while their testimony relates to substances that were admitted into evidence, I charge you that you may consider the circumstantial evidence concerning the substances that were admitted into evidence and the substance that Special Agent Abbott testified to concerning Count Two on November 20, 1973. As circumstantial evidence you may consider the price paid, if you credit the testimony, or the price negotiated, the use of code names, the surreptitious manner in which the parties negotiated, the surreptitious and secret manner, if you believe it was, in which their meetings were conducted. All of these are circumstances that you may consider in arriving at a determination on what the substance is. In other words, the Government must prove that the substance was cocaine and prove it beyond a reasonable doubt. But that proof does not require, and it is not essential to support a determination that the substance was cocaine, that expert opinion be presented; you can make such a determination based on all the evidence in the case.

(Cont'd on next page.)

PM

In this case, the defendant Bermudez and the defendant Diaz-Martinez took the stand and testified.

A defendant who wishes to testify is competent as a witness. You must judge the credibility of his testimony in the same manner as any other witness.

The defendant Jorge Vivas did not take the stand. The law does not compel a defendant in a criminal case to take the witness stand and testify. No presumption of guilt may be raised, and no unfavorable inference of any kind may be drawn by the failure of a defendant to testify.

A defendant who has been previously charged may rely on the failure of the Government to prove its case. It would be improper for you to discuss the failure of the defendant Vivas to take the stand.

Now, Mr. Dias presented three witnesses as character witnesses: The Reverend Hipolito Melendez and Alcira Gaitan and Mercedes Gaitan --

MR. MAHLER: Your Honor, those were Bermudez's witnesses.

THE COURT: I am sorry. I am glad you told me. And the jurors recall it better than I do. They were shaking their heads.

Bermudez.

Where the defendant has offered evidence of good general reputation for truth and veracity or honesty and integrity, or as a law abiding citizen, the jury may consider such evidence in the case. Evidence of the defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it's improbable that a person of good character and with respect to those traits would commit such a crime.

Now, Manuel Fiffe and Luis Felipe-Miranda testified that they participated in the crime charged. They do not become incompetent to testify in the trial because they say they participated in the crime charged. They are classified as alleged accomplices.

The testimony of an alleged accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated, or supported by other evidence.

Now, whether or not their testimony is corroborated or supported by other evidence is a question for you to decide. But I am Charging that even if Fiffe's and Miranda's testimony as alleged accomplices is not corroborated or supported by other evidence, their testimony

alone is enough to support a verdict of guilty. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. Their testimony is not to be considered by you as you might consider any ordinary layman's testimony. You must recognize that they say they participated in the crime charged. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe such unsupported testimony to be true beyond a reasonable doubt.

Mr. Miranda was convicted of a felony. That means he was convicted of a cime that is punishable by a prison term of more than one year. A prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may take into consideration in determining the credibility of the witness. It is the province of the jury and the jury alone to determine the weight to be given to the prior conviction.

If a witness is shown to have testified falsely as to a material fact knowingly, you may disregard all that witness' testimony, on the theory he is unworthy -- he or she is unworthy of belief. On the other hand, the jury has discretion to accept the portion of that witness' testimony that the jury believes is credible. That

principle underscores the wide discretion the jury has in weighing the credibility of witnesses.

Evidence was offered of the seizure of certain substances and equipment pursuant to a search warrant, from the home of Jorge Vivas on June 14, 1974.

Now, I charge you that as a matter of law it was after the Conspiracy terminated, and is not chargeable in any way against the defendant Bermudez, or Diaz-Martinez. And it's offered for a very limited purpose against the defendant Vivas. You are not to be concerned as to whether the equipment, the substance was evidence of another crime. The only purpose it's offered, if you find it credible, and you find it relevant to the issue, is to determine whether it is some proof that the defendant Vivas entered into the Conspiracy charged in this indictment, and for no other reason.

There was also some proof and some discussion on the obligation, putting it in the negative, or impropriet of a lawyer going over testimony with witnesses he calls to the witness stand. I Charge you during the trial that it is improper for a lawyer to suggest in any way what a witness should testify to. In other words, tell him the testimony the lawyer wants.

It is perfectly proper for a lawyer to ask a witne

what he knows about the case, to go over that testimony with the prospective witness, to go over it in question and answer form.

And it's my opinion that a lawyer has the obligation of doing that to properly prepare for trial.

We turn to the Charge in the Indictment. Now, if you compare the Indictment with the Memorandum of Verdict, you will find other names mentioned. Well, the other names have been identified as Fiffe, Blanco and Miranda. The testimony is that Fiffe and Miranda pleaded guilty. There is no evidence in the record as to why Blanco is not before you. And that's not for your consideration. It's not your concern.

The defendants before you are Bermudez, Vivas and Martinez. And the question before you is whether the Government proved the guilt of the defendant by proof beyond a reasonable doubt. But I will read the indictment in its original form, and you will have it before you.

Count One says:

"On or about between the 31st day of October, 1973, and the 1st day of May, 1974, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants Eduardo Bermudez, Jorge

Vivas also known as Jorge Posos, Israel Diaz-Martinez, Manuel Fiffe also known as Pfiefel, Victor Blanco also known as Red, and Luis Felipe Miranda, together with Juanita Diaz also known as Jenny, herein named as a co-Conspirator but not as a defendant, and other, did knowingly and intentionally conspire to violate Section 841 (a)(1) of Title 21, United States Code.

"1. It was a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance.

"2. It was further a part of said Conspiracy that the defendants and co-Conspirators would conceal the existence of the Conspiracy and would take steps designed to prevent disclosure of their activities," in violation of Title 21, United States Code, Section 846.

Now, I think I am at liberty to tell you that Two, Three, Four and Five are excised because they don't refer in any way to these three defendants, but they do refer to Fiffe, Blanco and Miranda. And that's why those numbers are missing.

Count Six:

"On or about the 20th day of November, 1973, within

the Eastern District of New York, the defendants Eduardo Bermudez, Jorge Vivas, also known as Jorge Posos, Manuel Fiffe, also known as Pfiefel, and Victor Blanco, also known as Red, did knowingly and intentionally possess with intent to distribute approximately one-half kilogram of cocaine hydrochloride, a Schedule II narcotic drug controlled substance," in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

Now, the reference in the Indictment to Title 21 and Title 18:

Title 21 is captioned Food and Drugs. And Title 18 is Crimes and Criminal Procedure.

The Congress determines what is a crime. And on October 27, 1970, the Drug Abuse Prevention and Control Act of 1970 became law. And it became effective May 1, 1971.

The Congress as a matter of policy established certain strict controls for the supervision of the importation, manufacture, transportation, sale and distribution of certain drugs.

Section 812 of Title 21 established certain Schedules. Cocaine hydrochloride was incorporated in Schedule II. Schedule II established the Schedule on

these findings.

"The drug or other substance has a high potential for abuse.

"The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use, with severe restrictions.

"Abuse of the drug or other substances may lead to severe psychological or physical dependance."

Under Schedule II(a)(4), it describes the following:

"Cocoa leaves and any salt, compound, derivative, or preparation of cocoa leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substantives."

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(continued on next page.)

And I charge you that cocaine hydrocloride comes within that definition.

Congress also provides under Section 841(a) of Title 21 the following:

It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled substance.

That is a section upon which Count 6 is based. It's called the substantive count.

Count 1, however, is a conspiracy count. And in very brief language, Section 846 describes the conspiracy.

It says, "any person who attempts to or conspires to commit an offense defined in this subchapter" violates the section.

There is a difference in concept between a conspiracy and what we call a substantive count, violating a specific prohibition, 841, you shall not possess with intent to distribute cocaine, and the conspiracy section which says, it's a violation of law to conspire to enter into a conspiracy to violate the law.

You see, that is a general term. So we call it the conspiracy statute, what the law condemns and proscribes, prohibits in a conspiracy is the entering

into the agreement.

It is not necessary for the Government to prove that an accused actually possessed cocaine in the charge of conspiracy to possess cocaine. While the substantive count that charges possession of cocaine with intent to distribute, it's vital to the Government's case to prove that the accused possessed the cocaine. It is just a slight variation of that, when I come to the substantive counts, I will charge you on aiding and abetting, the possession with intent to distribute. But let's deal with the conspiracy count.

What is a conspiracy? It's an agreement. It's an understnading. It's been properly described as a criminal venture similar to a commercial venture. It's an agreement between two or more to commit an unlawful act. Those who are members of the conspiracy are called conspirators.

A conspirator is a kind of partner in the enterprise. A conspiracy is a partnership in a criminal venture in which each member becomes the agent of every other member.

Mere association, the being together of two people, the mere similarity of their conduct does not make for a criminal conspiracy. People have a right

to assemble to discuss matters. If you find one party to have been a member of a conspiracy, the mere fact that the accused associated with that member is not enough. The mere fact that an accused was present at the time the conspiracy was in operation and even knew of the conspiracy is not enough.

You'll see that it is necessary for the Government to prove beyond a reasonable doubt that the accused participated, in some way entered the conspiracy, promoted the business of the conspiracy before you can say that an accused became a member of the conspiracy.

More than that, the Government must prove beyond a reasonable doubt that that activity, that that participation was knowing and willful.

In other words, that the accused was aware that the parties were dealing in cocaine. And that knowing that the parties were dealing in cocaine voluntarily and intentionally entered into the business, the conspiracy, knowing that it was a violation of law.

The Government doesn't have to prove that the defendant knew this specific section of law that was violated, but knew that it was a violation of law to deal in cocaine. It is not necessary for the Government

to prove that the parties sat down and entered a formal agreement; that the parties knew all the methods that the business was to use in order to succeed to accomplish the purpose. It is not necessary for the Government to prove that the conspirators knew one another. All that must be proved is that the members in some way or some manner -- and it could be the manner in which they dealt -- the Government must prove beyond a reasonable doubt that the members of the conspiracy in some way or some manner or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish the unlawful scheme or plan, in this case, the dealing in narcotics.

What the evidence in the case must establish beyond a reasonable doubt is that the conspiracy was knowingly formed; that the parties to the conspiracy were aware that they were dealing in cocaine, and that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to accomplish that purpose.

In order to bring an accused into the conspiracy, once the Government proves the conspiracy as alleged in the indictment is established, the Government must prove beyond a reasonable doubt that the accused

knowingly and willfully entered into that conspiracy; that knowing the unlawful plan, that he advised, assisted or does something that aids the conspiracy in its business.

Now, one who knowingly and willfully joined an existing conspiracy is chargeable with all the activities of the conspiracy from the beginning.

In determining whether a conspiracy existed, the jury should consider the actions of all the alleged participants. However, in determining whether a particular accused became a member of the conspiracy, you may consider only that accused acts and statements. In other words, if the witness Fiffe testified he spoke with Miranda or Mr. Blanco and one of the accused names were mentioned or his activities described, you may not use that testimony to determine whether the accused entered into the conspiracy. And you shouldn't confuse that with what I charge you on statements made outside the presence of the accused.

You see, criminal liability is a personal liability. The Government must prove by the testimony of what a defendant himself said or did by proof beyond a reasonable doubt in order to bring a defendant into the conspiracy. Now, once he is brought into the

6 Charge

conspiracy, then anything another member of the conspiracy says or does during the term of the conspirac and to promote the cocaine business is chargeable agains that accused.

If you think about it, you will understand the fairness. They are two separate and distinct principles One is a question of how to deal with the evidence. The other is a question of whether a defendant is a member of the conspiracy. You cannot charge the accused with acts or statements outside his presence of which he knows nothing unless and until you first find that he was a member of the conspiracy. And that in turn depends on whether the testimony supports proof that he entered into the conspiracy, which is another way of saying, testimony of what that accused said or did.

(Continued on next page)

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THE COURT: (Continuing.) We talk about conspiracy, we might think of three partners in some business all doing pretty much the same work and sharing equally in the profits.

Well, not every legitimate partnership is structured that way. There are partnerships in which there are executives; then you have some partners who are almost like stockholders and we call them limited partnerships.

The kind of conspiracy charged here was described as a chain conspiracy. Mr. Kimelman described it and by repeating what he said, it is not intended to give any substance whatsoever or support for his summation or his argument. It is only to describe the type of conspiracy described in this indictment. He described Mr. Fiffe's participation as a distributor, working under the boss of the conspiracy, Diaz-Martinez; Miranda was a delivery boy and Bermudez and Vivas were suppliers and that Blanco was an intermediary of some kind, a broker, possibly, and that Juanita Guzman, also known as Diaz, kept the cocaine in her apartment and packaged it.

In a chain conspiracy different participants

operate at different levels. It is not necessary to prove that the accused knew every level of operation or knew the identity of the individuals performing those duties.

It is necessary for the Government to prove that each one in the chain of operation in a chain conspiracy understood that the success of the business, of the conspiracy, depended on each one performing his duties.

When the conspiracy terminated is a fact question for the jury. I found as a matter of law that it had already terminated by June 14, 1974. So I instruct you that you cannot find a conspiracy existed on or after June 14, 1974. The important thing is that once the conspiracy terminates then the business is over, then one partner can no longer speak for another. It is only during the period of the conspiracy.

In order for the Government to sustain the charge in Count One, the conspiracy charge, the Government must prove all the following essential elements of the crime of conspiracy:

One: That the conspiracy described in the indictment was wilfully formed and existing at the

time alleged for the purposes alleged in the indictment, to wit, to knowingly and intentionally distribut and possess with intent to distribute, cocaine hydrochloride;

Two: That the accused knowingly and willfully entered into the conspiracy. And I told you that that means that the Government must prove beyond a reasonable doubt that he was aware of what the business of the conspiracy was and being aware of the conspiracy voluntarily and intentionally took part, participated in it, knowing that it was a violation of law;

Three: That one of the conspirators, thereafter, knowingly committed an overt act and that means that one of the conspirators, one of the members of the conspiracy, aware of what he was doing, committed an overt act.

An overt act is something that is visual or something that you can hear. It does not necessarily mean that it must be a criminal act. The Government does not have to prove an actual sale. It could be as innocent as or innocent looking or appearing like making a telephone call but if the telephone call is to call a customer or to arrange for a negotiation for a sale and it was done while the co-conspirator

was aware of what he was doing, then it was an act performed by a co-conspirator, a knowing act, and;

Fourth: That such overt act was knowingly done and in furtherance of some object or purpose of the conspiracy as charged and again that means that not only must it be done knowingly but it must be something to further the business of the conspiracy.

Count Six charges the defendants Bermudez and Vivas with possession of a half a kilo of cocaine hydrochloride.

The Government must prove beyond a reasonable doubt that the accused was in possession of approximately a half kilogram of cocaine hydrochloride, the Government does not have to prove the exact amount;

Two, that the possession was knowing and intentional and with intent to distribute. In other words, that it is the criminal intent that the Government must prove: first that the accused knew that the substance was cocaine and, of course, vital to that the Government must prove beyond a reasonable doubt that the substance was cocaine; and that the defendant or the accused knew that he was in possession of cocaine, and that it was possessed with intent to distribute. That means that it was not for personal use, that it was for purpose of sale.

5 Charge

Now, the law recognizes two types of possession; actual and constructive possession. A person who knowingly has direct physical possession of an article has actual possession.

As I hold my glasses, they are in my direct control, that is actual possession. A person who although not in actual possession knowingly has both the power and intention at a given time to exercise dominion or control over a thing either directly or through another person or persons is then in constructive possession of it.

For example, if my glasses were in my chambers or at the optician and being repaired and I could direct the disposition of it, the return of it, the sale of it, the destruction of it then I have constructive possession.

Now, possession may be sole or joint. If I had the joint funds of Mr. Adler and myself, let us say $100 belonged to us and I put it in my pocket, that would be joint possession and I would have actual possession and he would have constructive possession.

I charge you that conspiracy, a conspiracy charge is a charge that the accused entered into some agreement to perform an illegal act, while the

substantive charge is actually the illegal act.

In a case where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense.

Section 2 of Title 18 referred to in Count 2, says in part as follows:

"Whoever commits an offense gains the use or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. Whoever willfully causes an act to be done which if performed by him or another would be an offense against the United States is punishable as a principal."

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense.

Participation is willful if done voluntarily and intentionally and with specific intent to do something which the law forbids. In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wishes to bring about. That is to say that he willfully seek by some

act or omission of his to make the criminal venture succeed.

You, of course, may not find either defendant guilty of aiding and abetting unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons and that the defendant participated in its commission.

Now, that may be confusing. Every time I charge in a conspiracy and I also charge aiding, I say, "I hope it is clear in the jury's mind." It sounds very much like some of the things I said when I talked about the conspiracy.

The best way I can define it is on a theoretical basis. In a conspiracy the substantive crime for which the conspiracy has been established need not be proved. It is the agreement between two or more plus an overt act committed knowingly by one of the co-conspirators in furtherance of the conspiracy.

In order to find someone guilty of aiding or abetting, the Government must prove beyond a reasonable doubt that that crime for which he is charged with aiding and abetting was committed.

In this case, the Government must prove beyond

a reasonable doubt that the crime of possessing with intent to distribute a half kilogram or about a half kilogram of cocaine was committed. Otherwise, the accused could not be found guilty of aiding and abetting.

Now, you are about to be excused, you will be going home. There are just a few more instructions and I will excuse you for a few moments while I talk to the lawyers.

Something was said about the future of the defendants if you find them guilty. That is not your concern at all. You just determine whether the Government has proved its case beyond a reasonable doubt. Punishment is up to the Court. So you are free from that concern. Do not let it bother you.

The verdict must be a unanimous verdict. Each juror must decide the case for himself or herself.

The jury verdict, the jury process is a deliberative process, an exchange of ideas, a discussion of the evidence. No juror has the right to refuse to talk to his fellow jurors about the evidence in the case. He violates his oath if he comes to the jury room and says, "I have decided this case and when you ladies and gentlemen agree with me you will have a verdict."

He cannot take an intransigent position such as that and neither does he have the right to abandon his obligation to decide the case for himself. He will violate his oath if he says, "Well, they call me Goodtime Charlie or Goodtime Sue and I never argue; when you agree on a verdict I will go along with the majority." That is not right either.

You should discuss the evidence in the case with a view to arriving at an unanimous verdict. If you have arrived at a tentative verdict and after an exchange of ideas and viewing the evidence you feel you are wrong, you were wrong in the first place, do not hesitate to take a different position.

During your deliberations you may have some occasion to communicate with the Court and it will all be done by your foreman. If you want to hear any evidence in the case try to be specific, try to give the subject matter, the witness, if you can, direct or cross.

As I indicated, I will not give you the quick response I would like to but I may be otherwise engaged and I would have to release myself from that and then find the material you want. I will read you

what I think you want and nothing else. If you want any of the exhibits ask for them. None will be sent in without request.

If you want all exhibits, all exhibits will go in. If you want specific exhibits, ask for them and they will go in.

During your deliberations, I am not interested in how you stand at any particular time. I am not interested that you are six-to-six or eight-to-four or eleven-to-one. I am interested in when you have arrived at a unanimous verdict and when you have arrived at a unanimous verdict the foreman will say, "We have a verdict." Do not tell me what it is.

I will call you into the courtroom and ask you to stand, Miss Foreman, and I will ask you, "How do you find Eduardo Bermudez, guilty or not guilty? How do you find Vivas, guilty or not guilty, or Martinez, guilty or not guilty?"

Then I will go to Count 6, "How do you find Bermudez, guilty or not guilty,"etc. and you will rend your verdict. Then I wil- ask Juror No. 2, "Did you hear the verdict rendered by your Foreman; is that your verdict?" And so on up to 12. When everyon has answered in open court and said, "Yes," then we

know it is the verdict of this trial and it becomes a verdict.

I would ask you to leave the courtroom for just a few moments, I want to talk to the lawyers and then I will call you back into the courtroom.

(The jury withdrew from the courtroom at 5:35 o'clock p.m.)

THE COURT: Judge Harold Stevens is in my chambers. I had an appointment with him at 5:30. I would like to go in and tell him that I have to come back and take some exceptions to the charge, if you have them.

Are there exceptions?

MR. KIMELMAN: I have no exceptions.

MR. MATARAZZO: I have no exceptions to the charge.

MR. MAHLER: I have two.

THE COURT: How long will you take?

MR. SUTTON: A few minutes.

MR. MAHLER: Just a couple of minutes.

THE COURT: Let me tell him I will be with him in five or ten minutes.

(After recess. Out of the hearing of the jury.)

MR. SUTTON: I respectfully suggest, your Honor,

and take exception to the charge with respect to the expert that you had ruled as a matter of law that these -- Mr. Abbott, the two chemists were experts.

Could you expand as you did at the trial itself where you said your opinion at the point as a matter of law that they were expert has nothing to do with whether they are experts and that's solely a fact question which the jury has to consider and determine based upon what they have heard in the evidence.

THE COURT: Anything else?

MR. SUTTON: I respectfully except to that charge that circumstantial evidence, which you gave three examples,would solely be a basis upon which to find that the item under the conspiracy count was cocaine.

I respectfully submit that the items that you have given are not inclusive, not sufficient, misleading and that in fact there must be a finding that the item that they are charged with is in fact cocaine and that they must find it was cocaine hydrochloride t-at they had the conspiracy about, that the agreement as to the conspiracy charge was as to possession to distribute the cocaine, if they find

Mr. Abbott could not in fact tell just by looking or the tests he made and simply that --

THE COURT: This is the charge you want me to give them.

MR. SUTTON: These are the objections I am making;if you want I can give it to you. I didn't write it down.

THE COURT: What you are saying is I didn't charge them the Government must prove it is cocaine.

MR. SUTTON: It is my opinion that I don't believe you have expressed sufficiently clearly --

THE COURT: Did I say the Government must prove it is cocaine on the substantive count?

MR. SUTTON: Yes.

THE COURT: You are saying the Government must prove this by expert testimony?

MR. SUTTON: As to the substantive count, yes.

THE COURT: It may not be proved by circumstantial evidence. Is that what you are saying?

MR. SUTTON: What I say is that the circumstantial evidence examples which you have given are certainly not inclusive and I do say additionally to that that these factors that you have given to the circumstantial are not --

THE COURT: Anything else?

Go to the next thing.

MR. SUTTON: I except to your statement to the jury where you told them you are not to concern yourself why Blanco is not before you. I believe the evidence is before you that Blanco pleaded guilty. Mr. Vivas stated they made the same deal with Miranda.

THE COURT: Is it true they said Blanco pleaded guilty?

MR. KIMELMAN: The testimony to my recollection is they all sat down with the lawyers and they all decided to plead guilty but I don't believe there is any testimony beyond that.

Mr. Blanco went ahead and pleaded guilty.

MR. MAHLER: I'd object to a charge like that.

THE COURT: If it is in the evidence why should I not tell them Blanco pleaded guilty? I forgot there was any testimony that he pleaded guilty.

MR. KIMELMAN: There is testimony that they all sat down and decided to plead guilty.

THE COURT: I will tell them that. I don't know how it will help you. If it is in the evidence,

I will tell them.

MR. SUTTON: What I have before me is you said why Blanco was not before you.

THE COURT: You have won your point.

MR. SUTTON: I may withdraw the point.

THE COURT: You want to argue it and withdraw it?

MR. SUTTON: There may have been a confusion by the jury, this is the point I am trying to make. I made a point on summation as to Blanco for testimonial purposes. You have taken this to mean about Blanco for pleading purposes.

THE COURT: What do you want me to do? I said I will tell them Blanco pleaded guilty. He is still not before them. I will tell them Blanco pleaded guilty because it is in the testimony.

Do you want that?

MR. SUTTON: May the --

THE COURT: Next point.

MR. KIMELMAN: Something came to my mind. You also qualified, I believe, Special Agent Greenan as an expert --

THE COURT: Greenan?

MR. KIMELMAN: Yes, as an expert to determine

these were implements used in the cocaine business, the scissors from Mr. Vivas' house.

THE COURT: I am not going back over that. I know I didn't.

MR. SUTTON: I except to your reading the statute literally.

THE COURT: You don't want me to read it? They shouldn't know it? Go ahead.

MR. SUTTON: You charged at one point that the agreement was to be as to a criminal venture to commit an unlawful act.

I would respectfully ask that the unlawful act be the specific unlawful act of the intent to possess, of the possession with intent to distribute cocaine hydrochloride.

THE COURT: I read that at one point in the charge.

MR. SUTTON: Another point you omitted and there might be a confusion.

THE COURT: Go ahead.

MR. SUTTON: You spoke of a chain of conspiracy, a chain conspiracy. I would respectfully submit that it should -- these words should have been preceded by the word, "alleged" chain conspiracy.

17 Charge

THE COURT: Next.

MR. SUTTON: I except to your charging with respect to your example on constructive possession using your glasses as the example.

It raises the question --

THE COURT: Should I have used your glasses?

MR. SUTTON: No.

It raises the question of ownership and therefore, there should be a charge that the defendants must be found beyond a reasonable doubt to own, to have owned the cocaine.

THE COURT: Next.

MR. SUTTON: That's all I have.

THE COURT: All the exceptions are denied except that I will charge them that -- I will remind that them Blanco pleaded guilty.

MR. MAHLER: I object to that portion of your charge concerning the weight to be given to the testimony of the co-conspirators and I request that you charge in the language of United States v. Padgett and United States v. Gonzalez.

THE COURT: Denied.

MR. MAHLER: I request a charge that the defendant Diaz is not charged with the possession

18 of any of the physical items which appear in front of the jury on the Government's table.

THE COURT: Denied. That's another summation. If I sum up for the defendant I will have to sum up for the Government.

Didn't you tell that to the jury?

MR. MAHLER: No.

THE COURT: You should have done that.

MR. MAHLER: I ask your Honor to charge, as the theory I have submitted to you in my second request, to charge simply that the jury must find beyond a reasonable doubt that the -- all the illicit acts described are part of one conspiracy not portions of two conspiracies.

THE COURT: No.

I wish I had the latest case but I don't have time to look it up, where a judge charged he had to charge on a single conspiracy and they said it was too favorable.

Charges like that do nothing but confuse jurors. If there is a case where the evidence fairly would demonstrate multiple conspiracy I'd be glad to do it.

Where it isn't there, I am not dragging in unnecessary and confusing concepts. Our Court of

Appeals' judges have been struggling with it. I am trying to figure out what they mean by it.

Anything else?

MR. MAHLER: This is a problem not a request to charge. But we have submitted a copy of the indictment and it, of course, lists Juanita Dias as the name of the party known as Jenny.

THE COURT: That's why in my memorandum of verdict I said Juanita Guzman, known as Juanita Diaz.

MR. MAHLER: I ask you to instruct the jury as to what it is.

THE COURT: I said they determine fact questions. I already told them that. They already understand. I will do the right thing.

Call the jury in, please.

(The jury entered the court room at 5:46 O'clock p.m.)

(Cont'd next page.)

(At 5:46 o'clock p.m., the jury took its place in the jury box.)

THE COURT: Members of the jury:

I told you that it wasn't your concern that Mr. Blanco wasn't before you. I think I also said that you don't know what happened with Mr. Blanco's case. I may have said something like that. But it was called to my attention that there is evidence that Mr. Blanco pleaded guilty in this case, and also evidence that Fiffe, Blanco and Miranda had been in communication with each other, when they offered the plea.

Now, I just remind you of that, so that you know there is evidence of Mr. Blanco's relationship to this case, and I had overlooked it.

But again, I say the action is United States of America against Eduard Bermudez, Jorge Vivas, and Israel Diaz Martinez, and your consideration is directed to the three defendants before you.

At this point, we will suspend now till tomorrow when you will come in again.

Don't talk about the case when you come in tomorrow, don't talk about the case. I will give you further instructions when you get in, I will call you into the courtroom. There are certain formalities that have to be complied with, and then, soon after

ten o'clock, you will start your deliberations.

Don't think about the case, don't talk about it until tomorrow.

Please leave the papers that I gave you, the Memorandum of Verdict, and a copy of Count 1 and 6 in the jury room. The jury room will be locked, and you will find them tomorrow morning when you come in.

The jury is excused.

JUROR NO. 4: What time tomorrow?

THE COURT: Ten o'clock.

I am glad you asked me, you know that means ten of ten and so forth. All right.

Ten o'clock tomorrow, if I am not in the courtroom I am going to be across the hall, I will be in the other courtroom.

(The jury then left the courtroom.)

MR. MAHLER: May the record simply reflect my exception to your refusal to charge?

THE COURT: All requests that are not granted by the Court, are excepted to. The rights of the defendants to review are specific, we understand that.

MR. MAHLER: Thank you.

(At 5:50 o'clock P.M., the session was concluded.)

* * * * *

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- :

: 74-CR-403

EDUARDO BERMUDEZ, JORGE VIVAS, ISRAEL DIAZ-MARTINEZ, :

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

October 25, 1974
10:00 o'clock A.M.

B e fo r e :

HONORABLE JACOB MISHLER, Chief U.S.D.J.

MICHAEL J. MIELE
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: STEVEN KIMELMAN, ESQ.
Assistant U.S. Attorney

CHARLES SUTTON, ESQ.
Attorney for Defendant Bermudez

THOMAS MATARAZZO, ESQ.
Attorney for Defendant Vivas

STEPHEN MAHLER, ESQ.
Attorney for Defendant Diaz-Martinez

Also present:

EMILE RODRIGUEZ
JOAQUIN GUNA
Spanish Interpreters

(The jury is in at 4:15.)

THE COURT: I have your note. The lawyers agree the answer to the question and testimony of -- having the name Bermudez, there is no such testimony. One question definitely for Diaz, conversation between Miranda and the witness Rivera, employed by, well -- employed of Diaz as about cocaine.

Page 1298, direct examination by Mr. Mahler.

(The Court reads to the jury from the transcript.)

THE COURT: I'd like all questions written out because you see, if you and I get into a question and answer period, I might say something I shouldn't say. I can't tell you what I think of the evidence. I can only read it back to you. Sometimes, when you ask questions, the lawyers interpret or misinterpret the questions and then I have a feud with them.

So, I'd like to discuss with them privately what your questions are. That is more orderly that way. We'll take a recess.

(The jury is excused.)

jk

(At 5:02 p.m., out of hearing of the jury.)

THE COURT: The jury has sent a note out, "A written charge of what is a conspiracy." Mark that as a Court exhibit.

THE CLERK: Court Exhibit 11.

THE COURT: Any objection to submitting a written charge on definition of conspiracy to a jury?

MR. SUTTON: My instinct tells me to object.

THE COURT: How do you feel about it?

MR. MATARAZZO: No objection.

MR. MAHLER: I would like to see what the charge is.

THE COURT: Do you have any objection to a written charge given to the jury on conspiracy separate and apart from the rest of the charge.

MR. MAHLER: No.

MR. KIMELMAN: No.

THE COURT: I think it would be perfectly all right.

The only thing I don't have here is the charge.

I have another note, "Business cards of the record shop."

May I see what I said in the transcript?

Here is one business card.

MR. KIMELMAN: It is not quite clear.

THE COURT: It says business cards of the record shop.

MR. KIMELMAN: One business card of the record shop and one card in evidence with number and Jorge.

The number of the record shop.

THE COURT: Just send that in and see if they are satisfied.

What exhibit is that going in as or what is the number?

MR. KIMELMAN: 22.

THE COURT: Give it to the marshal.

THE COURT: If they want more, if they ask questions tell them to put it on a note.

THE CLERK: Jury note marked as Court Exhibit 12.

THE COURT: I am going to try to talk them out of this because I have an uneasy feeling that they may look at this printed word and take a phrase. If the whole charge were given to them I probably would feel a little better about it but one part of the charge I am a little concerned about.

(The jury entered the courtroom at 5:30 p.m.)

THE COURT: I would like to comply with your request to give you a written charge on conspiracy but I have certain fears about giving a written charge on part of the charge.

I might emphasize that there might be one phrase in it that you might hang onto. One juror might read the charge and another juror might not. Here I know all of the jurors will hear it. I would rather repeat or practically repeat what I said before and fortunately it has just come up from the court reporter and it has not been collated so I will just read it and turn the pages slowly so I don't upset the order.

"Count 1, however, is a conspiracy count. And in very brief language, Section 846 describes the conspiracy. It says any person who attempts to or conspires to commit an offense defined under this subject chapter violates the section. There is a difference in concept between a conspiracy and what we call a substantive count, violating a specific section, 841. You shall not possess with intent to distribute, and the conspiracy section which says it is a violation of law to conspire to enter into a conspiracy to violate the law. You see that is a general term, so we call it conspiracy statute. What the law condemns and proscribes, prohibits in a conspiracy is entering into the agreement. It is not necessary for the Government to prove that an accused actually possessed cocaine in the charge of conspiracy to possess cocaine.

While substantive count that charges possession of cocaine with the intent to distribute, it is vital to the Government's case that the accused possess cocaine. It is just a slight variation of that when I come to the substantive count, and I shall charge you on aiding and abetting the possession with intent to distribute.

Let us deal with the conspiracy count. What is a conspiracy? It is an agreement, it is an understanding.

It has been properly described as a criminal venture similar to a commercial venture. It is an agreement between two or more to commit an unlawful act. Those who are members of the conspiracy are called conspirators. A conspirator is a kind of a partner in the enterprise. A conspiracy is a partnership in a criminal venture in which the acts each member becomes the act of every other member. Mere association, the being together of two people, the mere similarity of their conduct does not make for a criminal conspiracy.

People have a right to assemble to discuss matters. If you find one party to have been a member of a conspiracy, the mere fact that the accused associated with that member is not enough.

The mere fact that an accused was present at

the time the conspiracy was in operation and even knew of the conspiracy is not enough. You will see that it is necessary for the Government to prove beyond a reasonable doubt the accused participated in some way, entered the conspiracy, promoted the business of the conspiracy before you can say that an accused became a member of the conspiracy.

More than that, the Government must prove beyond a reasonable doubt the activity, that that participation was knowing and willful. In other words, that the accused was aware that the parties were dealing in cocaine and that knowing that the parties were dealing in cocaine voluntarily and intentionally entered into the business, the conspiracy, knowing that it was in violation of law.

The Government does not have to prove that the defendant knew this specific section of law was violated but knew that it was a violation of law to deal in cocaine. It is not necessary for the Government to prove that the parties sat down and entered into any formal agreement, that the parties knew all the methods that the business was used in order to succeed to accomplish the purpose. It is not necessary for the Government to prove that the conspirators knew one another. All that must be proved is that the

members in some way or manner, and it could be the manner in which they dealt, the Government must prove beyond a reasonable doubt that the members of the conspiracy in some way or some manner or some contrivance, positively or tacitly came to a mutual understanding to try to accomplish the unlawful scheme or plan, in this case the dealing in narcotics.

What the evidence in the case must establish beyond a reasonable doubt is the conspiracy was knowingly formed, that the parties to the conspiracy were aware that they were dealing in cocaine, that one or more of the methods described in the indictment were agreed upon in an effort to accomplish that purpose.

In order to bring the accused into the conspiracy, once the Government proves the conspiracy as alleged in the indictment is established, the Government must prove beyond a reasonable doubt that the accused knowingly and willfully entered into that conspiracy, that knowing the unlawful plan, that he advised, assisted or does something that aids the conspiracy in its business.

Now, one who knowingly and willfully joins an existing conspiracy is chargeable with all the acitivties of the conspiracy from the beginning. In determining whether a conspiracy existed, the jury

should consider the actions of all the alleged participants; however, in determining whether a particular accused became a member of the conspiracy, you may consider only his acts and statements.

In other words, if the witness Fiffe testified he spoke with Miranda or Mr. Bianco and one of the accused's names were mentioned or his activities described, you may not use that testimony to determine whether the accused entered into the conspiracy and you should not confuse that with what I charge you on statements made outside the presence of the accused.

You see, criminal liability is a personal liability. The Government must prove by the testimony of what a defendant himself said or did by proof beyond a reasonable doubt in order to bring a member, a defendant, into the conspiracy. Once he is brought into the conspiracy and here I don't have the copy, once he is brought into the conspiracy then as a partner of the conspiracy he is bound by any acts or declarations of any member of the conspiracy made during the time of the conspiracy and in furtherance of the objectives of the conspiracy, and you must distinguish between those two ideas: One, as an evidentiary matter, how to deal with the evidence, but before you treat the evidence in that fashion, you must find that a defendant entered into the conspiracy,

was actually a partner, a member of the conspiracy because until that time he is not bound by anything that any member says outside his presence without his knowledge.

Now I hope that clears it up. The jury is excused.

(The jury withdrew at 5:40 p.m.)

THE COURT: I apologize, the last page was hidden here. It is here with a note. Here is what I said and I don't think it is different than what I just told them. I said once he is brought into the conspiracy then anything another member of the conspiracy says or does during the time of the conspiracy and to promote the cocaine business is chargeable against that accused.

If you think about it you will understand the fairness. There are two separate and distinct principles: One is how to deal with the evidence and the other is whether the defendant is a member of the conspiracy. You cannot charge an accused of a conspiracy outside of his presence of which he knows nothing -- it should have been which he knows nothing, unless and until you first find that he was a member of the conspiracy and that in turn depends on whether the testimony supports the proof that he entered into

the conspiracy, which is another way of saying testimony of what the accused said or did.

MR. MAHLER: I would like to request that you charge the jury in that form.

THE COURT: You want me to re-read what I just said?

MR. MAHLER: Yes.

THE COURT: I won't do it. Lawyers look for angles and not fairness.

(At 5:50 p.m.)

(out of hearing of the jury)

THE COURT: Please mark this Court Exhibit 13.

(So marked.)

THE COURT: It says: "We are unable to reach a decision."

What do you suggest, gentlemen?

MR. MATARAZZO: Are they unable to reach a decision on every defendant?

THE COURT: That is all they say.

MR. MATARAZZO: I suggest they deliberate some more.

THE COURT: That is a good idea.

(At 5:51 p.m. the jury entered the courtroom.)

THE COURT: I have your note saying you are unable to reach a decision, but I don't think you have

deliberated on this long enough. This was almost a week's trial and I would like you to continue to deliberate. You do not have to arrive at a unanimous verdict as to all the defendants on all the counts or both counts. If you have arrived at a unanimous verdict as to any defendant on any count you may report that. I would like you to either go back and deliberate tonight or come back tomorrow morning.

If you think that there is a possibility of reaching a verdict tonight I would suggest you continue.

You tell me in a note what you want to do. The lawyers spent a lot of time in preparing and it was a long trial. If you fail to agree it just means that the lawyers will have to do the work all over again and there is no reason to suppose that any other jury is going to be of better quality and decide it differently than you. I think it is important that you make an effort to come to a verdict, if you can, based on the evidence.

Suppose you retire to the jury room and tell me what you want to do. If you feel you can arrive at a verdict as to any one defendant as to either count, whether you think it would be helpful to continue tonight, but if not, whether you feel it is better to

come back tomorrow morning.

(Jury withdrew from the courtroom at 5:55 p.m.)

(Out of hearing of the jury.)

MR. SUTTON: I respectfully would except to your Honor's reference to the long time that the attorneys have prepared for the trial and the time we have spent. I think that might have been a pressure upon these jurors to arrive at a verdict that they may not want to arrive at.

THE COURT: What do you want me to tell them as a reason for continuing deliberations?

MR. SUTTON: I thought if you stopped just at the point where you can deliberate further with any kind of usefulness then do so and just stop there.

THE COURT: All right, your exception is noted.

(At 6:15 p.m., out of hearing of the jury.)

THE COURT: I have another note stating we are staying tonight. I do not know that I will keep them after 7:00, but I won't tell them that, gentlemen. I intend to let them go and come back tomorrow.

(Court Exhibit 14, jury note marked.)

THE COURT: I do not want to tell them that because if I do they might feel compelled, there might be a claim they were compelled to arrive at a verdict.

(Out of hearing of the jury, at 6:50 p.m.)

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THE COURT: I have two notes: Can you call my home to inform my husband of having to stay here?

The second one is, how did the cocaine arrive at the record store according to Fiffe direct and cross?

Can you find that?

MR. KIMELMAN: I think there is just one page.

THE COURT: Would it be the time of the phone call?

MR. MATARAZZO: November 20th.

THE COURT: Yes.

Anything on cross on that?

MR. MATARAZZO: If I can be of help, my best recollection, and I think it is on the point, is that it is either Mr. Abbott saw a stranger deliver it.

THE COURT: They don't want Abbott's testimony. They want Fiffe.

MR. KIMELMAN: I have found it and it is on 729. It is on line 17.

THE COURT: Yes. Just those two lines.

MR. KIMELMAN: Counsel can correct me, but I don't remember any cross on it.

MR. MATARAZZO: I don't.

THE COURT: Call them in and I will try to answer both questions by telling them that I suggest

they come back tomorrow and I will read this to them.

MR. KIMELMAN: I would request that they stay tonight.

THE COURT: It would take an hour or an hour and a half to get their food here.

(The jury entered the courtroom at 6:50 p.m.)

THE COURT: First question is how did the cocaine arrive at the record store? I will read that portion and the lawyers agree that as far as they can recall there was only question and one answer, page 729 line 17:

"DIRECT EXAMINATION OF MR. FIFFE:

"Question: Did there come a time when someone arrived with a package?

"Answer: The same man exited the store and five minutes later returned to the store with a package containing the half-kilo of cocaine."

Now, I am sorry, that is not all. On page 728 line 16:

"Question: Did there come a time when somebody else arrived at the record store that you saw?

"Answer: Yes.

"Question: Could you describe the circumstances involved in that person arriving?

"Answer: Around half an hour later a person

arrived and that person had a conversation with Bermudez and Vivas.

"Question: Did you hear that conversation?

"The Court: Yes or no."

Now, I suspend at Line 25 on 728 and go to Line 9 on 729:

"That the half-kilo was coming.

"Question: Who said that?

"Answer: The men who had just arrived.

"Question: Did he say this to Mr. Bermudez?

"Answer: To Mr. Bermudez.

"Question: Did you hear what Mr. Bermudez said to this man?

"Answer: All right, all right, the customer was there, the customer being Mr. Barry.

"Question: Did there come a time when someone arrived with the package?

"Answer: That same man exited the store and five minutes later returned to the store with a package containing the half-kilo of cocaine."

I suspended at Line 21, 729.

My suggestion is we suspend at this point and you return at 11:30 tomorrow morning. I would comply with your suggestion that you stay except that you cannot stay without food and it would take an hour,

an hour and a half to get the food over here and that is trouble.

So I think it is impractical to stay later tonight and that is my suggestion.

Suppose you go back and give me your thoughts on it. Who wrote the note here?

JUROR NO. 9: I did.

THE COURT: I will wait and see what happens.

(Out of hearing of the jury.)

THE COURT: I have a note saying we will come back tomorrow.

(Jury note marked Court's Exhibit 15.)

(Jury note marked Court's Exhibit 16.)

(Jury note marked Court's Exhibit 17.)

(The jury entered the courtroom at 7:02 p.m.)

THE COURT: We will suspend at this point. The case will continue at 11:30 tomorrow.

It is critically important that you not discuss this case with anyone at this point, not even on your way to the elevator or subway. When you reassemble tomorrow do not talk about the case until I find that you are all here and I will put you in the jury box and then I will ask you to retire for further deliberations.

You start deliberating at 11:30 at the very

place you left off when you are all together. Do not talk about the case. Leave all the papers in the jury room and we will lock it up and nobody will disturb them.

Tomorrow morning you will find a menu, because I will be able to order your lunch for you and send it to you. If you want some cigarettes on your order you order it then.

If any of you would like to make a telephone call to tell your spouses or whoever you want to tell that you have been delayed and you want to tell them you are on your way home, you can use the telephone in my office.

The jury is excused.

Are you all going to the subway or some going to your cars?

All right, you are excused.

(Jury withdrew at 7:05 p.m.)

(Out of hearing of the jury.)

THE COURT: I wanted to tell the marshal to instruct them to go down to the subway in a group. I am a little concerned about some of the things that are happening around our courthouse. I don't want to plant any fear in them because again I will have a

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cry from the defendant. I don't know whether you can possibly go down in the subway with them.

I want all the defendants and lawyers to remain in the courtroom and give the jury five minutes to leave the court.

THE MARSHAL: We will go with them, your Honor.

(Whereupon, the matter was adjourned for the day.)

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
NOV 21 1974
TIME A.M.
P.M.

UNITED STATES OF AMERICA,

-against-

74-CR-403

EDUARDO BERMUDEZ, JORGE VIVAS, ISRAEL DIAZ-MARTINEZ,

Defendants.

United States Courthouse
Brooklyn, New York

October 26, 1974

B e f o r e :

HONORABLE JACOB MISHLER, Chief U.S.D.J.

MICHAEL J. MIELE
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: STEVEN KIMELMAN, ESQ.
Assistant U.S. Attorney

CHARLES SUTTON, ESQ.
Attorney for Defendant Bermudez

THOMAS MATARAZZO, ESQ.
Attorney for Defendant Vivas

STEPHEN MAHLER, ESQ.
Attorney for Defendant Diaz-Martinez

Also present:

EMILE RODRIGUEZ
JOAQUIN GUNA
Spanish Interpreters

(At 12:15 p.m. the jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen. I'm glad we are all here, although Juror No. 2 had difficulty because of the train schedule. We are here and that is what is important.

The jury is excused for further deliberations. I think your lunch will be here in fifteen minutes to a half-hour so that you can deliberate during your lunch hour and that will save some time.

(Out of hearing of the jury.)

THE COURT: To save some time, I think you ought to take your lunch hour now because I don't think they will come back with a verdict within the next ten or fifteen minutes.

(At 1:40 p.m., following occurred out of the hearing of the jury.)

THE COURT: We have a note, testimony of Special Agents looking in window of clothing store.

Whose testimony is that?

MR. KIMELMAN: Special Agent Alleva.

THE CLERK: Jury note marked Court Exhibit 18 for identification.

THE COURT: The next is testimony on what Piffe was paid for working in clothing store. I don't think

Fiffe testified but I think Mr. Diaz testified to that. He said something like $150 or $180. He said it was commission.

MR. KIMELMAN: I see it on page 1347, line 10.

THE COURT: Is that the only reference to it?

MR. KIMELMAN: I don't recall asking the question on cross.

THE COURT: All right, if you find anything let me know.

The next says Vivas' cross-examination, Abbott's cross-examination, Fiffe and Miranda. They apparently want your full cross-examination.

Abbott would be on page 455.

THE CLERK: That is on the 18th and running into the 21st.

MR. MAHLER: Did they ask for Mr. Matarazzo's cross?

THE COURT: Yes, only Mr. Matarazzo's cross.

On page 824, I have Mr. Matarazzo, no questions of this witness.

MR. MATARAZZO: Of which witness?

THE COURT: Of Fiffe.

Is there any place else that you said anything?

MR. MATARAZZO: I don't recall any. I think there the same thing happens with Miranda.

MR. KIMELMAN: On page 920, Mr. Matarazzo says he has no cross of Miranda.

THE COURT: Here it is on line 20.

MR. MATARAZZO: Yes, sir.

THE COURT: I will tell the jury that Mr. Matarazzo has no cross of Fiffe or Miranda.

Seat the jury.

(The jury entered the courtroom at 1:50 p.m.)

THE COURT: The first request is the testimony of Special Agent looking in the window of clothing store and this is the testimony of Special Agent Alleva direct examination by Mr. Kimmelman.

(The Court thereupon proceeded to read from page 59: line 14 to line 8, page 593.)

THE COURT: Now, on cross-examination on the same subject by Mr. Mahler:

(The Court thereupon proceeded to read from page 59' line 18 to line 14 at page 598.)

MR. MAHLER: I believe there is a little more cross on that same subject.

THE COURT: I intend to read whatI understand the subject matter to be.

MR. MAHLER: I would like you to look at page 599.

THE COURT: All right. I will continue after line 18 on page 598.

(The Court thereupon proceeded to read from page 598 at line 18 and suspended reading at page 599 line 17.)

THE COURT: Now, page 1347, line 10 I will proceed to read at.

(The Court thereupon proceeded to read from page 1347 line 10:

"THE COURT: How much were you paying Mr. Fiffe?

"THE WITNESS: Fiffe was getting a commission.

"THE COURT: How much were you paying him?

"THE WITNESS: It could be 150, 180, 200, but the idea of paying Felippe $125 was because he was on the roll and he was on the books and he was paying income taxes, you know, to show the Government he was correct."

Now, the third question is Vivas' attorney's cross-examination and that is Mr. Matarazzo, Mr. Matarazzo so agrees that there was no cross-examination of Fiffe or Miranda.

The following is the cross-examination of Mr. Abbott by Mr. Matarazzo, beginning at line 4 on page 455 to line 7 at page 460.

I will read line 8.

Now I will suspend at line 14.

Now, on page 461 line 4.

(The Court thereupon proceeded to read from

page 461 line 4 to line 13 on page 461.)

THE COURT: I will go to line 5 on page 462:

(The Court thereupon proceeded to read from line 5 on page 462 to line 13 on 462.)

THE COURT: Now, I will skip to line 18 on page 462 and suspend at line 5 on page 463.

(The Court thereupon proceeded to read from line 18 at 462 to line 5 on page 463.)

THE COURT: I will go to page 467 -- I am sorry, to 468 line 4.

(The Court proceeded to read from page 468 line 4 to line 19 at page 471.)

THE COURT: There is no secret about skipping these pages because the jury was excused at that particular time and I wouldn't want you to hear it now for the same reason.

I will go to line 5 on page 475.

(The Court thereupon proceeded to read as indicated.)

THE COURT: That is the end of Mr. Matarazzo's cross-examination.

The jury is excused for deliberation.

(Jury thereupon withdrew from the courtroom at 2:15 p.m.)

(At 3:50 p.m.)

THE CLERK: Note from jury marked Court Exhibit 19 for identification.

(Out of hearing of the jury.)

THE COURT: The note is: "Charge, what is a conspiracy?"

I will make one more try at it. Apparently what I told them before --

MR. SUTTON: Maybe if I get my briefcase I can say something.

THE COURT: Apparently they don't understand it.

I read from the -- isn't this where I read directly from the charge book?

I charged them in some of the language I usually use. They wanted it in writing and instead I read it to them. I will try to give it to them in layman's language once more.

Seat the jury.

(The jury entered the courtroom at 3:51 p.m.)

THE COURT: Well, your last note asked me to define conspiracy. I have given you a definition a number of times and I will try again by saying it differently, but, of course, always meaning the same thing. It might be helpful to describe it by distinguishing it.

When a defendant or an accused is charged with

doing something to violate the law, normally it is a specific section. You are prohibited from doing something. When the charge is that the accused did something, that charge is, we call a violation, a substantive violation and so in this case, in Count 6, the defendant Bermudez and Vivas are charged with the possession of cocaine. I indicated that type of possession was the kind of possession that charged them with dealing in it, and the possession was possession with intent to distribute.

The statute says it is unlawful to possess cocaine with intent to distribute, and, of course, I am not giving you the full charge because the Government has to prove that that possession was knowingly and willfully, they are aware of it and that is one type of a crime. That is a substantive offense.

What Congress makes a violation is the getting together for the purpose of violating the law with intent to violate the law, so that it isn't the possession of the cocaine that is prohibited in 846, though as I say that is a violation, but it is the getting together for the purpose of dealing in cocaine and the phrase used in the indictment is possession with intent to distribute cocaine; but that is what is meant by it.

Now, a conspiracy obviously takes two or more people. That is a difference, another difference between conspiracy and the substantive crime, because it is a getting together. We call it an agreement.

The Government must prove that two or more people and at least one of the accused got together for the purpose of going into the cocaine business.

Now, I also charge you to make sure that the Government's proof must show a conspiracy and not people -- not just getting together and talking about non-criminal activities. Make sure that the accused didn't just happen to be there innocently or by accident. Before you convict anyone for being a part of the group that is dealing in cocaine, the Government must prove that the party charged, the accused, knew that what he was doing, his activity if he sat down to talk to someone, if he got on the telephone and talked about something, if he drove in the car, if he sat down with a prospective buyer, that he knew it was part of that group's activity to deal in the cocaine.

Again, that it wasn't by pure accident.

When I talked about what the Government has to prove beyond a reasonable doubt I pointed out all the elements of conspiracy that the Government

has to prove:

One, that there was a conspiracy as charged in the indictment. The conspiracy in the indictment charges that first, the time -- it is on or about and between the 31st day of October of 1973 and the 31st day of May of 1974, and the purpose, again, as I say, was to deal in cocaine.

The Government must establish that, by proof of what all the alleged conspirators said and did, as if you view their activities and found, from what they said, and from how they said it, the way they dealt with each other. Did the Government prove beyond a reasonable doubt that they were in the cocaine business? That is one element.

Number two, that the particular defendant, the accused charged, knowingly and willfully entered into that conspiracy. The proof through the testimony of what that defendant did must show what he said or did. Do you believe the testimony? Do you believe the testimony? Does that testimony show beyond a reasonable doubt that the accused was aware that what he was doing was participating in the cocaine business, not just accidental and he knew it was a violation of law to deal in cocaine.

The third element, that thereafter one of the

members of the conspiracy, any member of the conspiracy, knowingly and willfully committed an overt act and that means did anything that was observable, that was obvious for the purpose.

And then, the fourth element, the overt act was committed in furtherance of the cocaine business.

If he took a ride, did he do it to negotiate with a buyer, deliver cocaine, to collect the money, to deliver the money?

And was that act in furtherance of the conspiracy, the cocaine business?

So there is nothing mysterious about it. It need not be a formal, express agreement. The Government does not have to prove that all the members of the conspiracy got together and understood and agreed on everything about the conspiracy, and the Government doesn't have to show that Mr. A was designated to do this work and B to do this work, one to buy the narcotics, the other to deliver it and the other to sell it. The Government does not have to prove that any of the members of the conspiracy knew one another. But, what they do have to prove that the party to be charged and the defendant understood that there were others in the deal, in their group, carrying on this business, and that in order for them to be successful

that everyone had to do their job. Someone had to get the narcotics and someone had to package it and someone had to get the customers; and someone had to deliver it. The Government must prove that the accused was aware of that.

Now, as I say, if the Government proves all the four elements essential to this crime beyond a reasonable doubt then you must find the accused guilty. If you find they have not proved all those elements, then find them not guilty.

Again, I hope that I have explained it. I know coming into court as a jury for the first time, it is not an easy concept. But, we have been here now for two weeks and this is the third or fourth time I explained it to you and I hope I got it across to you.

The jury may be excused.

(The jury withdrew at 4:03 p.m.)

(Out of hearing of the jury.)

THE COURT: I will take exceptions to the charge.

MR. MAHLER: I take exception to the general nature of the charge and I would like to request that you charge the jury formally, the same exact manner as you charged them originally.

THE COURT: The same language I gave them three times.

MR. MAHLER: Yes. I would like you to charge that before a defendant such as Diaz-Martinez can be charged with the overt act of --

MR. KIMELMAN: This is Government's Exhibit 22 and 23 which has been returned.

MR. MAHLER: (Continuing) -- Bermudez and Vivas, as co-defendants, they must find beyond a reasonable doubt that they were part and parcel of one conspiracy, one and the same conspiracy.

THE COURT: You mean Diaz cannot be charged with an overt act of Fiffe, Miranda or Bianco?

MR. MAHLER: Unless the jury finds that they were all part and parcel of the conspiracy. I request you to charge that it was insufficient for conviction to find that a party, that one of the defendants knew of the conspiracy or that it must be found beyond a reasonable doubt that he did something to further that conspiracy.

THE COURT: I charged that already.

I charged before that they understand this is not anything different and is just an explanation of what I gave them.

Anybody else?

MR. SUTTON: It might be possible that the jury may be finding a problem with an agreement to do a

specific criminal act or agreement to make a particular sale as distinct from agreement involving two going into the business of cocaine. I don't know. That is just my impression.

THE COURT: If I knew I would do a better job, too. I can only answer the question.

There is a charge that is in here -- oh, we have another note which says, we have reached a verdict.

THE CLERK: Note marked Court's Exhibit 20 for identification.

(Jury entered the courtroom at 4:05 p.m.)

THE COURT: Madam Foreman, I have your note saying we have reached a decision.

Would you please stand?

Now, in the case of the United States against Eduardo Bermudez, Jorge Vivas, Israel Diaz-Martinez, as to Count 1, how do you find the defendant Eduardo Bermudez? Guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: How do you find the defendant Jorge Vivas, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: How do you find the defendant Israel Diaz-Martinez, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: As to Count 6, how do you find the defendant Eduardo Bermudez, guilty or not guilty?

THE FOREMAN: Not guilty.

THE COURT: How do you find the defendant Jorge Vivas, guilty or not guilty?

THE FOREMAN: Not guilty.

THE COURT: Thank you. You may be seated.

Juror No. 2, you heard the verdict rendered by the Foreman.

Is that your verdict?

JUROR NO. 2: Yes.

THE COURT: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes.

THE COURT: Juror No. 4, is that your verdict?

JUROR NO. 4: Yes.

THE COURT: Juror No. 5, is that your verdict?

JUROR NO. 5: Yes.

THE COURT: Juror NO. 6, is that your verdict?

JUROR NO. 6: Yes.

THE COURT: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes.

THE COURT: Juror No. 8, is that your verdict?

JUROR NO. 8: Yes.

THE COURT: Juror No. 9, is that your verdict?

JUROR NO. 9: Yes.

THE COURT: Juror No. 10, is that your verdict?

JUROR NO. 10: Yes.

THE COURT: Juror No. 11, is that your verdict?

JUROR NO. 11: Yes.

THE COURT: Juror No. 12, is that your verdict?

JUROR NO. 12: Yes.

THE COURT: And so say you all.

Any motion before I discharge the jury?

All other motions -- I mean challenging the verdict.

Does anybody want to make a motion?

All right, all other motions can be made at another time.

MR. SUTTON: May I ask to rise and have a question put?

Are you referring to motions to set aside the verdict?

THE COURT: Yes. I will give you until the date of sentencing, if you wish.

MR. SUTTON: Thank you.

THE COURT: This has been a long trial and I know from the time you spent you were very serious and very intense in examining the evidence. After your discharge which will happen in a few moments, you probably will never again sit on a federal jury. It is

not because you are not welcome to do it, but only because we have so many on the master jury wheel, some five or six hundred thousand that it is rare that a jury sits in the federal court more than once in his or her lifetime. It can happen, but it is almost like a lottery.

This has been an experience for you. You have just gotten some view of the way our system works, and what a trial is and what it means and everybody takes his job seriously, the lawyers, the Court and the jury.

It is a slow process but it is one that I think works. The defendants are safeguarded with traditional safeguards that have worked for hundreds of years.

Not every bit of evidence is entered into the case, for example, it is significant that what happened in this case, that I may disclose to you now, was not brought before you. The witness came in and said that Fiffe and Miranda threatened Mr. Diaz, to show a motive for testifying, to show he was angry at Diaz, so he might have testified falsely is a witness who herself is under serious investigation, and when the undercover policeman, Mr. Rodriguez came in to testify, I know you were not aware of it, she wasn't in the courtroom because I asked her to leave and the undercover agent was concerned that she would recognize him. He was not

concerned about recognizing her.

Now, that could not have been brought before you.

The question of the dealing in marijuana, on that November 20th meeting, the Government wanted to introduce proof that they talked about marijuana, too, in addition to cocaine, and the Government wanted to show that Mr. Bermudez was arrested down in the Eastern District of Louisiana, and was involved in a deal that involved four and a half tons of marijuana. That could not have been brought before you because it was important that you determine whether he was guilty of this charge.

Now you determined it free of those collateral matters and you can be made aware that there was more that could not be brought before you. So all the parties are entitled to is fair treatment, to know that you looked at the evidence and decided the case on the evidence alone.

Sometimes there is always some lingering doubts that I wish there was more, and the Government's burden is a heavy burden but it does not go beyond proving its case beyond a reasonable doubt. I would agree with you. I think they did it. The jury is excused with the thanks of the Court.

(The jury withdrew at 4:15 p.m.)

(Out of hearing of the jury.)

MR. MAHLER: If your Honor's remarks are made part of the trial record I move to strike them. I don't think an appeal, on appeal we should be burdened with your last remark.

THE COURT: I won't strike it. I believe every word I said.

MR. MAHLER: That may be well, but --

THE COURT: Do you think my statements are going to influence the Court of Appeals that there was sufficient evidence?

MR. MAHLER: I don't think it was well for the defendants and --

THE COURT: Do you remember I denied your motion to dismiss at the end of the Government's case? Was that a view of the case?

MR. MAHLER: That is something that is part and parcel of the trial.

THE COURT: I don't think they will look at that. If they don't agree with me, if they think all your motions are based on multiple conspiracy and your motions to dismiss the indictment on the ground there wasn't any testimony, and the Grand Jury sustained the indictment, what I said at the end of the Government's case and what I say now, what I just said to the jury

won't mean a thing.

No, I won't strike it and it won't affect your appeal. If I thought it would I would say I am not the Court of Appeals and not passing on my own determination and they understand that.

MR. SUTTON: I think there was a very substantial question and you had Mr. Bermudez' question on the line, and you questioned him on the stand as to whether or not he was in fact arrested for this charge that you were talking about on marijuana, for four and a half million tons, and I think the record shows that there was no complaint ever filed against the defendant and --

(continued next page)

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THE COURT: Mr. Sutton, I agree with that. I just said the Government wanted to bring that evidence in.

United States vs. Stadder supports that and I told the jury I kept it out.

MR. SUTTON: I just wanted to say something to that point. I am not saying you don't have a right to say what you said. You have a right to say anything.

THE COURT: I can't hurt you and I have a First Amendment right, the same as you have.

MR. SUTTON: With respect to the Charge, as I was talking you had gotten the note from the jury that they had reached a verdict. I was excepting to your Charge and I did not go far enough to the point on explaining the conspiracy in respect to an agreement that is necessarily involved in committing a single act as distinguished to an agreement involving a conspiracy among the defendants and the others. That is what I was trying to give you, the point that I was trying to bring over.

I can give you the citation, I think it is United States against Porara.

THE COURT: You are talking about proof as to a single act as to whether someone entered into a conspiracy?

MR. SUTTON: Whether that is the agreement they are talking about when they talk about the conspiracy.

THE COURT: I think your point is made.

Anything else?

Any problem about bail here.

MR. SUTTON: May we have a continuation of bail.

THE COURT: Let me have a look at it.

MR. KIMELMAN: The Government asks that all defendants be immediately remanded, particularly the defendant Bermudez who is out on $50,000 surety --

THE COURT: It is not a surety bond.

MR. KIMELMAN: Secured by $5,000 cash.

I believe the defendant Vivas is out on a $50,000 secured by $2,500 cash and property.

THE COURT: Vivas is a citizen, isn't he.

MR. MATARAZZO: He is married to a citizen in Immigration right now.

Your Honor was present at the bail hearing and he has been here every time and never moved. They have another charge against him.

THE COURT: Is there bail on the other charge.

MR. MATARAZZO: Yes, right here in this Court. I think it is for $35,000.

THE COURT: A personal appearance bond.

MR. MATARAZZO: Personal appearance. His

building is put up.

MR. KIMELMAN: It may be the same building.

THE COURT: That is pretty good security, a building. It is his home?

MR. MATARAZZO: Yes.

THE COURT: I don't think one with a family is apt to leave and place that in jeopardy.

I am not so convinced about the others.

MR. SUTTON: Bermudez, Mr. Bermudez has his wife and children here and the passports have been delivered to Mr. Kimelman.

THE COURT: They can be forged and they can get a forged passport for $35 downtown.

MR. SUTTON: He has been here religiously every time he has been on call. He has not missed a day.

THE COURT: I know the argument and it means something. If he hadn't been here, if there was a history of him taking flight, I would just remand him.

We take too much of a risk with narcotic defendants and when they are convicted of the offense the risk is higher.

MR. SUTTON: When I had a belief there might be that possibility I said so, but it has been proven completely unfounded.

In other words, all the times he has been around

and my conversations with him, I think Mr. Kimelman can support this, what I have been saying, my impression has been completely satisfied and I had a doubt, I must tell you, I had a doubt in the beginning and I was quite concerned and it turned out my concern was false and I have spoken to him with his family.

THE COURT: I saw both of them on the stand and I think we have Bermudez and Diaz, we have very resourceful defendants here.

MR. KIMELMAN: That is the difficulty. The Government has a very serious problem on both defendants and in view of the jury's decision it is difficult for the Government to believe that both defendants, if they said they would return they now would not return.

THE COURT: I wouldn't take their word for it. I want to know what they have to gain or lose.

Vivas hasn't been tested but Bermudez and Diaz are both constant liars. I don't know whether that means they would take flight.

MR. MAHLER: Where would he go? He is as white collar as any man that appears before you.

THE COURT: What does that mean?

MR. MAHLER: I don't think he should be examined in any other light.

THE COURT: Has he got his home put up.

MR. KIMELMAN: He has an interest in the premises.

THE COURT: Is your house up for security.

MR. KIMELMAN: I believe there is some real estate here.

THE COURT: I will put him in the same classification as Vivas.

MR. MAHLER: He's not from another country.

THE COURT: Is he a citizen of the United States.

MR. MAHLER: Yes. He has not been to Puerto Rico. He has been here since 1958.

MR. KIMELMAN: May we have a representation of the equity in the property.

THE COURT: What equity do you have in that house.

THE DEFENDANT MARTINEZ: I paid $29,000 for the house and I bought it five years ago.

THE COURT: How much is the mortgage on it.

THE DEFENDANT MARTINEZ: $244.

THE COURT: Practically paid off?

THE DEFENDANT MARTINEZ: I wouldn't say that.

THE COURT: You pay $244 a month?

THE DEFENDANT MARTINEZ: Yes.

THE COURT: What is the balance? How much was the mortgage originally?

THE DEFENDANT MARTINEZ: I put $4,500 on it

originally.

THE COURT: That is not -- well, that is about the same as Bermudez's $5,000 in cash.

You are out of business now?

293 Grant Street is out of business?

THE DEFENDANT MARTINEZ: It is closed because I am not sure what will happen in my case.

THE COURT: Are you still in business.

THE DEFENDANT MARTINEZ: Yes.

THE COURT: Selling clothes?

THE DEFENDANT MARTINEZ: Clothes.

THE COURT: Who fixed bail originally.

MR. KIMELMAN: You did, your Honor.

MR. MAHLER: I might point out my client has been here on every occasion.

THE COURT: You said he paid you in full and he wouldn't do that if he wasn't going to take off. That is good logic.

MR. KIMELMAN: I submit Mr. Bermudez and Mr. Diaz's case, the amount of actual cash or property, surety, relative to the $50,000 bond is very low and would not be indicative of these --

THE COURT: Well, how much would be enough.

MR. KIMELMAN: I think the $50,000 surety should be full and covered by cash or property.

THE COURT: Fully collateralized?

If I thought he was that big a cocaine dealer I would agree with you but I don't think he is.

I will continue bail on terms and conditions fixed.

I am mostly concerned about Mr. Bermudez.

MR. SUTTON: I will try to check up on him every day voluntarily without any obligation.

THE COURT: It does not do any good. If someone wants to leave he can call in every day and then on a weekend, a Friday he can take off.

You cannot watch him every day. He will call you and I think it is a good faith offer but he will call you and you might call the United States Attorney and say he is here and he can call early in the morning and in the meantime prepare to take off and then one Monday morning you won't get a call and you will come in and say, Judge, I made it in good faith and I am surprised.

MR. SUTTON: I can check on weekends.

THE COURT: I don't want to keep a defendant without bail unless there is good reason to believe he will take off.

He has many places on earth to go and live comfortably. It is not easy to leave. It is only if

you have the money and have a place to go to that you might leave.

The one I am concerned with is Bermudez.

Vivas -- well, he may go back to Colombia and that is a risk. He has children here and a wife here and I don't know if she would be happy in Colombia, so he will take a chance on a reversal, probably. I am trying to think like they would think.

MR. KIMELMAN: I don't know for sure. I would request if any defendants do have passports that they be surrendered.

THE COURT: That is for sure.

Do you have a passport.

MR. MATARAZZO: It is at the Immigration Bureau.

I think frankly it is at the Immigration.

THE DEFENDANT VIVAS: I lost my passport.

THE COURT: More than three years ago? It wouldn't be any good unless he validated it.

How long did you lose it.

THE DEFENDANT VIVAS: A long time ago. I lived in this country for fifteen years.

MR. MAHLER: Mr. Diaz-Martinez does not have a passport.

MR. KIMELMAN: The only difficulty the Government has with Mr. Diaz relative to the amounts of his

dealings is that we have information that he is also dealing in substantial amounts of marijuana. This may be a continuing enterprise.

THE COURT: If it is continuing, bring him in again and then I will give it to him on the bail issue. I will make sure he is where we can see him. I have a suspicion -- incidentally, it is one of the hallmarks of the cocaine business, that they continue dealing in drugs even after they are in jail and convicted. Not everybody does, but sometimes.

It is amazing. If they violate the bail conditions the Government will get something for all the trouble and expense it went through and I shall have gained experience.

MR. KIMELMAN: The only thing the Government would gain is $5,000.

THE COURT: From where I sit, this is a pretty good chance.

All right, sentencing of course will depend on the probation department. I expect all defendants to come in on Tuesday, come in with your lawyers before 4 o'clock and you will be interviewed by a probation officer where he will ask you your background, marital status, prior working record and your background material so that I will have some information when it

comes to determine the sentence to be imposed.

All right.

Thank you, gentlemen.

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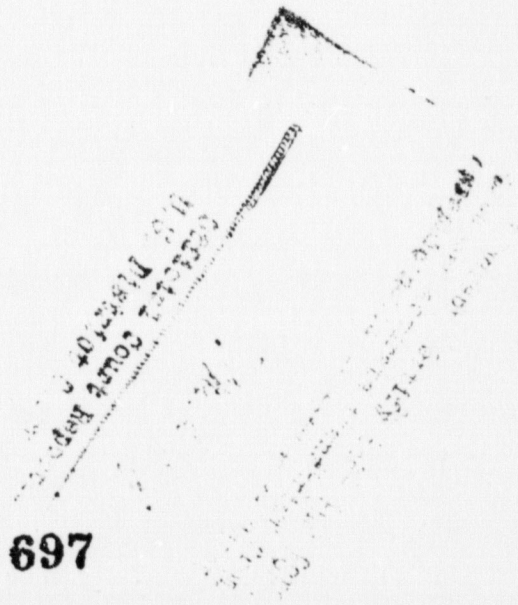

U.S. v. Martinez - Wallace

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of April, 1975 deponent served the within Appendix upon U.S. Attorney

attonrye(s) for Appellee

in this action, at 225 Cadman Plaza East
Brooklyn NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
11 day of April, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976